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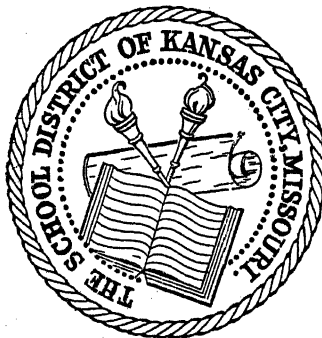
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Publications of the
Carnegie Endowment for International Peace
Division of International Law
Washington

THE CLASSICS OF INTERNATIONAL LAW

EDITED BY

JAMES BROWN SCOTT

*Trustee and Secretary of the Carnegie Endowment for
International Peace*

Member of the Institute of International Law

President of the American Society of International Law

ELEMENTS OF INTERNATIONAL LAW

BY HENRY WHEATON

A Literal Reproduction of the 1866 Edition of Richard Henry Dana, Jr.,
edited by George Grafton Wilson, with a Chronological List
of Editions and Translations of Wheaton's *Elements of
International Law*, a Table of Cases, and Indexes;
to which are prefixed a note on *Henry Wheaton
and International Law*, and a *Sketch of the
Life of Richard Henry Dana, Jr.*, by
George Grafton Wilson.

This volume constitutes No. 19 of 'The Classics of International Law'. A list of the numbers already published is given at the end of this volume.

PREFACE

THE republication of the classic works connected with the history and development of International Law was undertaken by the Carnegie Institution of Washington in 1906 at the suggestion of the undersigned, then Solicitor for the Department of State, under whose supervision as General Editor the series has since been published. On January 1, 1917, the project was transferred to the Carnegie Endowment for International Peace, and the publication of the series is being continued by the Endowment's Division of International Law.

One reason for republishing the classics of International Law is the difficulty in procuring the texts in convenient form for scientific study; the libraries in the United States have been searched with the result that few of the earlier works were to be found. The same difficulty exists in Latin America, Japan, and in a less degree in many European countries. Another reason is that some of the foreign works selected for republication have never been translated into English.

Eminent publicists, European and American, who have been consulted as to the usefulness of the plan to republish the classics, have endorsed the project and have pledged their personal co-operation. The works to be included in the series have not only been approved but even suggested by them, so that the undertaking is international in scope, in selection, and in execution.

The underlying principle of selection has been to reissue those works which can be said to have contributed either to the origin or to the growth of International Law, and the term classic has been used in a broad rather than in the narrow sense. In general, the text of each author is reproduced photographically, so as to lay the source before the reader without the mistakes which creep into a newly printed text. In the case of some early authors the photographed text will be accompanied by a revised text whenever that course shall seem desirable. An Introduction, prefixed to each work, gives the necessary biographical details and states the importance of the text and its place in International Law; errata in the original are indicated, and notes deemed necessary to clear up doubts and ambiguities or to correct mistakes in the text are supplied.

Each non-English work is accompanied by an English version made expressly for the series by a competent translator.

It is hoped that the series will enable specialists as well as general readers to trace International Law from its faint and unconscious beginnings to its present ample proportions, and to forecast with some degree of certainty its future development into that law which Mirabeau tells us will one day rule the world.

Preface

Henry Wheaton's *Elements of International Law* was first published in the year 1836, and its inclusion in this series one hundred years later is appropriate not only as marking the centenary of its original publication but also as a recognition of the fact that it has stood the test of time and may therefore properly be considered a classic in the literature of International Law.

The present edition has been prepared by George Grafton Wilson, an eminent American publicist and authority on International Law and for many years professor of that subject at Harvard University. The text chosen for reproduction, as indicated in Professor Wilson's Introduction, is that of Dana's edition of 1866. It should, perhaps, be added that the choice in question represents a departure from the practice heretofore followed in the series of reproducing, whenever possible, the last edition issued during the lifetime of the author because it might fairly be presumed to contain the text which had his final approval. In the case of Wheaton's *Elements of International Law*, however, it was felt that the famous edition of 1866, containing Dana's voluminous and frequently cited notes, should be chosen for reproduction because it has for many decades been more widely known and used than any other edition.

In issuing the present volume the purpose has been, not to add to the number of revised editions of Wheaton, but to reproduce what has come to be considered the standard and, indeed, classical text of his treatise. Therefore, in preparing the edition, Professor Wilson has taken great care to keep the reproduction intact with respect to both Wheaton's text and Dana's notes. With this in view all editorial corrections have been made in footnotes. The reader will in consequence have before him a literal reproduction of Dana's edition, with its errors corrected in such a way as not to alter the original text.

In addition to his editorial notes and Introduction, Professor Wilson has supplied a sketch of the life of Dana and a chronological list of the editions of Wheaton's *Elements of International Law* in various languages. The Endowment is indebted to him also for the likeness of Wheaton which appears as a frontispiece to the volume.

WASHINGTON.
January 1, 1936.

JAMES BROWN SCOTT,
General Editor.



Henry Wheaton

*From an original daguerreotype
in the possession of George Grafton Wilson*

ELEMENTS OF INTERNATIONAL LAW

BY
HENRY WHEATON

THE LITERAL REPRODUCTION
OF THE EDITION OF 1866
BY RICHARD HENRY DANA, JR.

EDITED, WITH NOTES BY
GEORGE GRAFTON WILSON

*Professor of International Law
Harvard University
Membre de l'Institut de Droit International*

OXFORD: AT THE CLARENDON PRESS
LONDON: HUMPHREY MILFORD

1936

Printed in Great Britain
At the OXFORD UNIVERSITY PRESS
By John Johnson
Printer to the University

920358

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The portrait of Wheaton appearing in this volume is from a daguerreotype
in the possession of George Grafton Wilson.

HENRY WHEATON AND INTERNATIONAL LAW
BY GEORGE GRAFTON WILSON

HENRY WHEATON AND INTERNATIONAL LAW

Elements of International Law with a Sketch of the History of the Science, by Henry Wheaton was published concurrently in London and in Philadelphia in 1836. Many editions of the *Elements of International Law* have appeared since that time. In the editions between 1836 and 1846 changes and additions were made by Wheaton. The edition of 1848 published in French at Leipzig and at Paris was revised by Wheaton himself before his death and may, therefore, with the English edition of 1846, be considered his latest utterance upon international law.

In the Advertisement of the first edition, which is dated Berlin, January 1, 1836, just one hundred years ago, Wheaton said: 'The object of the Author in the following attempt to collect the rules and principles which govern, or are supposed to govern, the conduct of States in their mutual intercourse in peace and in war, and which have therefore received the name of International Law, has been to compile an elementary work for the use of persons engaged in diplomatic and other forms of public life, rather than for mere technical lawyers, although he ventures to hope that it may not be found wholly useless even to the latter.' The weight of Wheaton's opinion in diplomatic affairs and in judicial decisions has since proven that the author's anticipations were far too modest.

In the editions of 1836 there appeared a *Sketch of the History of International Law*. This was based upon an anniversary discourse which the author had delivered before the New York Historical Society at its meeting of December 28, 1820.¹

This sketch does not appear in later editions as Wheaton had published in the meantime, in 1845, his *History of the Law of Nations* covering in a comprehensive manner the material touched upon in the *Sketch of the History of International Law*. While omitting the *Sketch* in subsequent editions, Wheaton does, however, transfer to the text some historical material.

The two editions of 1836, one appearing in London and one in Philadelphia, are alike so far as contents are concerned, though ordinarily the London edition is in two volumes and the Philadelphia edition in one volume.

Of the third edition, issued in 1846, Wheaton says, in the preface: 'In preparing for the press the present edition of the *Elements of International Law*, the work has been subjected to a careful revision, and has been considerably augmented. The author has endeavoured to

¹ *Collections, New York Historical Society*, 1821, vol. 3, p. 231.

avail himself of the most recent questions which have occurred in the intercourse of States, the discussion and decision of which have contributed to throw new light upon that system of rules by which all civilized nations profess to be bound in their mutual intercourse.' In the third edition some of the material formerly in the footnotes appears in the text and in general the changes are comprehensive.

In this and the later French edition of 1848, prepared by Wheaton, there is a tendency to pay more attention to principles as set forth in adjudicated cases and to give less weight to natural law doctrines. He also in the third edition drops the term 'law of nations' as the alternative to 'international law' in his definition and follows Bentham's lead in adopting 'international law', while supporting Savigny's recognition of its positive character though admitting that it is 'imperfect'. The influence of the work of Heffter and other writers of the period is also evident.

Official opinions of governmental advisers are recognized as among the sources of international law. Wheaton's distinction between state and nation and his idea of sovereignty is made clearer in this third edition. There is also rearrangement of material. The chapters on 'Right of Self Preservation' and on 'Right of Independence' are combined and a new chapter on 'Rights of Civil and Criminal Legislation' is inserted. This chapter contains some of the material from the combined chapters, gives much more attention to the law of *res judicata*, and in particular shows the influence of the then recently published work of Foelix. Chapters are also enlarged by material relating to fisheries and other maritime matters with some of which Wheaton's negotiations had given him special familiarity. Wheaton's retirement from the diplomatic service made it possible for him to write more freely upon diplomatic matters in the third edition and to illustrate from his own experience.

In treating 'Rights of War', Wheaton writes much more fully of the war of 1812 and other nineteenth-century differences than in the earlier editions, specially discussing the questions of capture and enlarging on the discussion of 'free ships, free goods'.

The other chapters are not greatly changed from the text of the earlier editions though throughout there is evidence that the opinions of reviewers of these editions received from Wheaton careful and discriminating attention.

There are added, in appendices, the Maritime Convention of 1801 between Great Britain and Russia, covering many of the disputed questions to which the Armed Neutralities had given rise, and the Final Act of the Congress of Vienna, 1815, which fixed the state of Europe for the time being. An index also increases the value of the third edition.

The texts of the French editions of 1848 and 1852, commonly reckoned the fourth and fifth editions, are practically identical as are the subsequent French editions, though there is some change in paging. The French edition published in 1848, in which the preface bears the date April 15, 1847, is the last edition to which Wheaton gave revision, as he died within the year.

The first American edition after the death of Wheaton, edited by William Beach Lawrence, appeared in 1855 and was republished in 1857. In his 'Introductory Remarks', pp. xiii-clxxxiv, Lawrence offers a 'brief sketch' of Wheaton's 'public career and preliminary pursuits'. Lawrence says: 'In the preparation of the present edition, that of Leipzig, of 1848, which had received the latest corrections of the Author, has been adopted as the standard, though matter contained in previous editions and there omitted, as being specially applicable to the United States, is now retained. No liberty has been taken with the original text, except to translate and insert such additions as were made to the French publication, and of which no English manuscript could be found.' The text of the third edition of 1846 is used as the basis for this edition.

Lawrence, in this edition, inserts notes additional to those of Wheaton referring to matters which had occurred or had become public since Wheaton's death and also refers to more recent publications. The discussion in these notes is sometimes more extended than that in the original text of Wheaton and touches many points on which Lawrence had decided opinions. Indeed the total number of pages of Lawrence's notes is about one hundred in small type as compared with about five hundred pages of Wheaton's large-type text. These notes, with the 'Introductory Remarks' of Lawrence, make his contribution to this edition about two hundred and eighty-five pages, exclusive of the appendix.

This edition of 1855 of Lawrence has a table of cases from English and American Reports and an index.

Lawrence issued what he called a 'Second Annotated Edition' in 1863, which was reprinted in London in 1864. Of this edition and referring to his edition of 1855, Lawrence says: 'Much of what appeared as "Introductory Remarks" in the last edition, is now incorporated in notes or in the "Notes of the Author". Some extended notes will be found in the Appendix.' In general the notes in this edition are more extended and at times somewhat controversial. It is not infrequently the case that a few lines of text have below them a long note, and Lawrence's appendixes cover more than one hundred and thirty pages and a supplement of nearly fifty pages is also added.

During the period between the first and second editions of

Lawrence's Wheaton, there was issued a French edition of Wheaton in 1858, which was another reprint of the edition of 1848.

In 1860 an Italian edition translated by Arlia from the French edition of 1848 was issued at Naples.

In 1864 there appeared another reprint of the French edition, in two volumes, '*sui vie d'un commentaire par William Beach Lawrence en quatre volumes*'.

There was also given in 1864 a striking evidence of the influence of Wheaton's work in the translation into Chinese, under the general advice of Dr. W. A. P. Martin, assisted by a commission of scholars appointed by Prince Kung, of Wheaton's *Elements of International Law* in four volumes. The work when published was sent to a large number of Chinese officials for their general guidance. When it was published the American Minister, Anson Burlingame, making of the event a special note, wrote to the State Department, 'The Chinese did not address me in writing, but called in person to mark their sense of the importance of the completion of the work, and when the Prince and suite kindly sat for their photographs, Fung Sun, who had superintended the translation, desired to be taken with a copy of Wheaton in his hand.'¹

The edition published in China was quickly exhausted. The work had been received with much favour in Japan. An edition of this Chinese text reprinted and adapted for Japanese use was published in Kyoto, Japan, in 1865, and other editions were issued in the East.

Other translations into foreign languages were also made, not all of which have been published.

Dana's edition of Wheaton was issued in 1866.

Lawrence's *Commentaries on the Elements of International Law and History of the Progress of the Law of Nations* appeared in French in four volumes between 1868 and 1880 in which, with much new material, there was published material from Lawrence's earlier editions of Wheaton. Many matters treated in these volumes, while having incidental bearing on international law, are primarily of importance to other branches.

Another French edition of Wheaton was published in 1874.

A large number of English editions have been issued. Those of 1878, 1880, and 1889 were by A. C. Boyd, in each of which there were notes and appendices bringing the work down to the respective dates. In 1904 J. B. Atlay continued the work of Boyd. These editions contained much valuable material. An edition called the fifth English edition by Coleman Phillipson was issued in 1916. This is unlike the earlier English editions in removing 'all distinction between the original author's writing and that of his editors'. An edition called the sixth

¹ *Diplomatic Correspondence*, 1865, pt. ii, p. 438.

English edition following a plan somewhat similar was issued by A. Berriedale Keith in two volumes in 1929.

The numerical sequence of editions of Wheaton's *Elements of International Law* is not always chronological even if in the same language, and unauthorized editions add further confusion. The family of Mr. Wheaton requested Mr. Dana to call his edition the eighth.

Wheaton's *Elements of International Law*, commonly called the eighth edition, edited, with notes, by Richard Henry Dana, Jr., Boston: Little, Brown, and Company, 1866, is the edition chosen for a place among the Classics of International Law. Of all the editions of Wheaton probably this is the most frequently cited, and not merely Wheaton's text but also Dana's notes have been cited in many legal decisions. The text of this edition is the same as that of the earlier edition of Lawrence, and the issue of Dana's edition was the ground of long litigation between Lawrence and Dana involving the Wheaton family and the publishers.¹

The text of Dana's edition being identical with that of Lawrence is based on the third edition, 1846, with the later changes and additions introduced in the French edition of 1848.

Dana says in the 'Editor's Preface' that the text 'may be supposed to have now become, by the death of Mr. Wheaton, unalterable'. Dana does, however, number the sections consecutively, 'for greater convenience of reference'. He further says, 'This edition contains nothing but the text of Mr. Wheaton, according to his last revision, his notes and the original matter contributed by the editor.'

In the 'Editor's Preface' there is a brief sketch of Wheaton's life to which the present editor has added certain notes marked G.G.W. to distinguish these from other notes.

The text followed in Dana's edition as compared with the first edition shows the influence of German writers upon Wheaton. Slavery and other contemporary questions received more attention. Wheaton's changes from the text of the previous editions are more common in the earlier than in the later chapters. There are changes in order of material indicating a tendency to emphasize less the natural law ideas of the prior period and to place more weight upon positive law. The discussion of sovereignty became more clear and some matter which had been added to the third edition is omitted in the sixth. There is a growing recognition of the field of conflict of law and some recent cases on the rights of property are considered, particularly property at sea. Many long discussions of the first edition are reduced to a paragraph or to a brief note.

Dana's notes are indicated by the letter D. These refer particularly to publications and events since the death of Wheaton and discuss certain topics at length.

See 'Sketch of Life of Dana', *post*, p. 21a.

The period of the middle of the nineteenth century afforded new material for Dana's notes. The Monroe Doctrine had been somewhat tested and Dana gives it a long note and takes up the related matter of intervention in Mexico under the convention of 1861 to which France, Great Britain, and Spain were parties. The question of slavery, recognition of belligerency, contraband, blockade, continuous voyage, convoy, the *Trent* affair, and other questions arising during the American Civil War, 1861-5, offered Dana much new material for notes, and many of these topics received elaborate treatment. The same is true of matters arising during the period 1840 to 1860 and involving naturalization, extradition, and recent practices in civil and criminal legislation. As Dana's edition went to press the feeling between the United States and Great Britain over the *Alabama* affair was acute and his long note of more than forty pages on the Foreign Enlistment Act gives a comprehensive idea of this controversy at a time before the method of settlement had been arranged. Later, in 1877, in his argument before the Halifax Fishery Commission, Dana had opportunity to use some of the material which he had gathered upon the long-standing North Atlantic Fisheries dispute.

Dana's notes constitute about one-fifth of the volume called the eighth edition. Some of these notes have been reprinted elsewhere, as in the case of his note on the Monroe Doctrine, which appeared in pamphlet form and later with additions by his son as Chapter XIV in *Speeches in Stirring Times*.

In many respects Dana's preparation for work in the field of international law was similar to that of Wheaton. His education, training in the law, contact with men at home and abroad qualified him, like Wheaton, to take a broad view of the subject, while appreciating the importance of its technical aspects. Dana's period—he was born in the year of the Congress of Vienna and died in 1882—covered years full of international events which tested treaties and principles. His participation in American Civil War cases and other cases involving the application of international law gave to his notes vitality and an authority like that which Wheaton's text gained from his experience in international affairs.

Dana's studies in international law continued after the publication of the eighth edition of Wheaton and during his later sojourns in Europe he was actively engaged in the preparation of a work upon international law. He had already begun writing this work. His manuscript notes showed ample evidence of the careful method with which he was laying the foundation for this work and promised a further valuable contribution to the science of international law of which his death deprived the world.

Like Grotius, Wheaton made contributions to other fields of

Henry Wheaton and International Law

knowledge. His *History of the Law of Nations*, 1845, became the standard. His other writings in history, literature, and biography received immediate recognition. His high ideas of public and private conduct compelled respect from all parties and in negotiations brought forth justice. Wheaton may be named with Grotius as one of the great expounders of the science of international law.¹

GEORGE GRAFTON WILSON.

CAMBRIDGE, MASSACHUSETTS,

January 1, 1936.

¹ A more extended sketch of the life of Henry Wheaton will appear in the edition of Wheaton's *History of the Law of Nations* in this series of Classics of International Law.

SKETCH OF THE LIFE OF RICHARD HENRY DANA, JR.

RICHARD HENRY DANA, Jr., who edited the eighth edition of Wheaton's *Elements of International Law*, was born in Cambridge, Massachusetts, August 1, 1815, and died in Rome, Italy, January 6, 1882. His family had been associated with public affairs in America since the days of settlement of Massachusetts. Mr. Dana entered Harvard College in 1831. His course was broken by a voyage to California which subsequently became the basis for the book which has a high place in American narrative writing, *Two Years Before the Mast*. Mr. Dana, returning, graduated from Harvard College with the Class of 1837, attaining the highest standing. Immediately after graduating he enrolled in Dane Law School (now Harvard Law School), where he had the advantage of close contact with such men as Story and Greenleaf.

In 1840 Mr. Dana entered actively upon the practice of law. In this year also appeared his book, *Two Years Before the Mast*, and in the following year a book, *The Seaman's Friend*. His personal experience in maritime affairs as well as these books brought him business relating to shipping. Mr. Dana's practice steadily increased, though, owing to his conscientious defence of positions often unpopular or opposed to the dominant commercial and business interests, his practice was not always highly lucrative. As Dana said of a fellow member of the bar, so it could be said of him, 'He seems to be a gentleman practising law and not a mere lawyer.'

Mr. Dana was married in 1841 to Miss Sarah Watson, of Hartford, Connecticut.

Mr. Dana's active work in many lines seriously impaired his health, and in 1859 he started upon a trip around the world. On his return, much benefited, he again entered actively into work. From 1861, during the trying period of the American Civil War, he held the responsible office of United States District Attorney for Massachusetts. During this period Mr. Dana was in close touch with international affairs. He was keenly conscious of the significance of cases before the courts as he said in 1863 of the Prize Cases, 'So the judiciary is actually, after a war of twenty-three months' duration, to decide whether the government has the legal capacity to exert these war powers. This is the result of a written Constitution, as a supreme law, under which there is no sovereign power, but only coordinate departments.' Mr. Dana's argument in the case of the *Amy Warwick* was clear and convincing, and his conduct of the case on behalf of the government called forth the highest commendation even from President Lincoln.

The position of Judge of the United States District Court was open to Mr. Dana, but he did not feel it expedient to take this place. He, however, retained the office of United States District Attorney till September 1866.

Before resigning this office, he had undertaken, at the urgent request of Mrs. Wheaton, the editing of a new edition of her husband's work on international law. Up to this time the copyright of the work was in Mrs. Wheaton's name. He made extended notes. These he considered with his father, whose criticisms on style and method he particularly valued, and with his brother Edmund, who was familiar with European systems of law. He consulted the books relating to the subject in the libraries, but he says, 'I did my work at my study in Cambridge, which for two years was a workshop and depot of international law, my table, chairs, and floors being mainly covered with borrowed books or my own in immediate use, while I wrote at a standing desk'; and he further said, 'However long I may live, I can never expect to try harder and give more original power to any subject than I did to those notes.' The result of these labours was the eighth edition of Wheaton's *Elements of International Law*, edited with notes by Richard Henry Dana, Jr., LL.D., Boston: Little, Brown, and Company, 1866.

In 1866 Mr. Dana, partly in recognition of his work upon Wheaton's *International Law*, received the degree of Doctor of Laws from Harvard College.

Of this eighth edition of Wheaton, which he edited, he said: 'The present, is, therefore, the eighth edition. The notes of Mr. Lawrence do not form any part of this edition. It is confined, as has been said, to the text and notes of the author, and the notes of the present editor, who undertakes his work at the request of the widow of Mr. Wheaton, recently deceased, and of his only surviving children, his daughters.'

This statement in the preface to Dana's edition was probably made in view of the fact that it had, at first, been proposed to use all the material of Mr. Lawrence's edition of which the text was used and merely to bring that edition to date.

Mr. William Beach Lawrence, to whose editions of Wheaton's *International Law* reference is made, immediately took exception to the statement of Mr. Dana. A long controversy, involving legal proceedings between Mr. Lawrence and Mrs. Wheaton, the publishers, and Mr. Dana, followed. Mr. Lawrence also endeavored to obtain an injunction against the issue of Dana's edition of Wheaton. The matter relating to this case would fill several volumes. The deposition of Mr. Dana in 1868 covered 222 pages, and Mr. Lawrence's reply, 255 pages.

A decision was handed down by the court, September 20, 1869. This decision declared Mr. Lawrence had an equitable right by what amounted to an assignment to him from Mrs. Wheaton of copyright

Sketch of the Life of Richard Henry Dana, Jr.

in his notes; that Mr. Dana, though not actually notified, might be held to have a 'constructive' knowledge of this assignment; that Mr. Lawrence had no claim to copyright in the text of the edition; and that the sale of Dana's edition should not be stopped pending a report from a Master as to the question of the extent to which Mr. Dana may have infringed upon Mr. Lawrence's right to the notes in his preceding editions. To the Master's report, made in 1877, legal exceptions were taken. The final report was not filed till January, 1881, and adds more than 200 pages to this controversial material. This report was filed January 14, covering 211 quarto pages, but not printed. The case was not appealed to the Supreme Court. The Master said in his report on the notes to Dana's edition of Wheaton (*Lawrence vs. Dana et al.* 15 Fed. Cas. 63.): 'It must be remembered that D.[ana] was to cover by his notes a period of eighteen years, since Wheaton published his last edition in 1848, fifteen years of which had been covered by the learned and exhaustive notes of the complainant. It is apparent, therefore, that if the second annotator discharged his duty with diligence and fidelity, there must inevitably be strong resemblance between the two sets of notes, and a large proportion of the citations must be common to both. Direct and positive proof as to where the second annotator found his citations, or as to how far he traced them back, is not attainable.' Of the great number of notes included in Dana's edition, the Master, venturing an opinion with 'much hesitation' after long investigation under the strict and technical rules laid down by the court, reports that of more than two hundred and fifty references and citations thirteen may be considered as infringing the complainant's equitable rights. Even as to these points the question involved is not of using Mr. Lawrence's own writing, but of using references and paragraphs in citations where in some instances neither editor had exactly followed the original text.

Mr. Lawrence's demand for an injunction on the sale of Dana's edition was denied by the court. The edition was sold before the final report of the Master, which was made fifteen years after the issue of the book. Interest in the case had for the most part disappeared. The editions were left to win their place upon their merits. Dana's edition of Wheaton's *International Law* came to be recognized as one of the leading authorities cited in the courts of the world during the nineteenth century.

In 1873 Mr. Dana, writing of himself, said, 'I should like to be relieved from the time-wasting of ordinary lawsuits—for they are no better to a man at my age,—and to be able, the next eight or ten years, to use my powers and knowledge in a larger sphere. Or, if I am not to be so employed, to give my mind and study to a work on international law.' The politics of this period were not particularly attractive or

suitable to a man of Mr. Dana's habits or character, and his political campaigns at this time were not satisfactory or happy. In 1876 President Grant, not conversant with the plans of certain influential senators and without previous consultation, nominated Mr. Dana as Minister of the United States to Great Britain, but this nomination was not confirmed by the Senate. In the following year Mr. Dana served as one of the counsel in the Halifax Arbitration under the provisions of Article XXII of the Treaty of Washington of 1871.

The longing to devote himself to the preparation of a work on international law was often expressed, and in 1878 Mr. Dana gave up the practice of law and with members of his family went to Europe, there to further elaborate his plans. The death of his father in 1879 caused Mr. Dana to revisit Cambridge for a short time, after which he returned to Europe to continue gathering and arranging material for his proposed treatise on international law.

The manuscript notes which Mr. Dana made during these years show careful attention to historical preparation in the events and institutions with which international law deals. (The writer, through the courtesy of Mr. Dana's son, Richard Henry Dana, 3d, has these notes before him.) Mr. Dana's notes on Grotius' *De jure belli ac pacis* refer to what Mr. Dana regards as the main points from page to page and raise queries as to positions which he does not regard as clear, sound, or in accord with later practice or theory. That he should have begun with a review of Grotius with detailed notes was indicative of the nature of the work for which he was planning.

Funk-Brentano and Albert Sorel had recently, in 1877, issued *Précis du droit des gens*. To this Mr. Dana gave attention as presenting late points of view, particularly as emphasizing war as the main sanction of international law. To many of the positions in this book, Mr. Dana raised decided objections in his notes.

Mr. Dana then seems to have read critically Sir Edward Creasy's *First Platform of International Law* which had been issued in 1876. To this book he does not give much attention. He also made a careful study of Wheaton's *History of the Law of Nations*. After this Mr. Dana turned to a familiar field and reviewed Wheaton's *Elements of International Law* as edited by Boyd. He then endeavoured to obtain the German point of view as shown in a late edition of Heffter's *Völkerrecht* in the translation by Bergson as republished in 1873. He finds much in Heffter which would be serviceable in his plans for a treatise on international law, though there are positions to which Mr. Dana is entirely opposed, especially in the matter relating to prize courts. His interest in maritime law led him to make many notes on Ortolan's *Diplomatie de la Mer*. Mr. Dana naturally gave very careful attention also to Kent, using Abdy's edition and finding much suggestive material. The notes

Sketch of the Life of Richard Henry Dana, Jr.

on Twiss's *Law of Nations* are extended and detailed, with many observations as to the merit of the text. The recent translation of Bluntschli's work on international law by Lardy was the more interesting to Mr. Dana because of its references to Wheaton's *International Law* and because Bluntschli had been led to make the attempt to codify international law through Dr. Lieber's successful drafting of Instructions for the Government of the Armies of the United States in 1863. In this systematic work he finds many suggestive points. William Edward Hall's *International Law* appeared in 1880, and Mr. Dana saw much of value in this new and somewhat pro-British treatise.

Mr. Dana did not confine himself to treatises, but supplemented these by reading monographs, recent cases, and journals containing articles on special topics. While he particularly studied in Paris, he visited other parts of Europe, greatly enjoying Italy. He had his material well in mind and had begun to put it on paper, but his contribution was never given to the world, for he was stricken with pneumonia in Rome and did not recover.

The simple tablet in the old Protestant cemetery where Shelley and Keats lie buried bears the following inscription:

RICHARD HENRY DANA
OF BOSTON
UNITED STATES OF AMERICA
BORN AUGUST 1, 1815,
DIED IN ROME
JANUARY 6, 1882.

January 1, 1936.

GEORGE GRAFTON WILSON.

NOTE

THE capitalization and punctuation of the eighth edition of Wheaton's *Elements of International Law* varies somewhat from that of earlier editions, and in those editions there are also many differences in printing. Such minor typographical variations have not been indicated in this revision, but in other respects some corrections, though seemingly insignificant, may be helpful and have been made. Occasionally a reference to a book commonly available at the time of publication is indicated rather than an earlier edition which the author may have used, but where different editions of the same book are referred to in succeeding pages without indication, in making corrections the edition most frequently cited is followed. In some instances the citation mentioned is expanded in order that it may be identified more easily. For corrections in Wheaton's text, editions of books referred to are prior to 1845, and for Dana's notes editions prior to 1866.

In this edition notes are indicated as follows:

Wheaton's notes, as in the edition of 1866, by (a), (b), (c).

Dana's notes, as in the edition of 1866, by superior numerals and footnote-brackets followed by —D., as [¹.]—D.

Wilson's notes by superior numerals in angle-brackets and footnote-brackets followed by—G.G.W., as [¹.]—G.G.W.

An effort has been made in order that errors and possibly misleading statements which have reappeared in successive editions of Wheaton may not be further perpetuated.

WHEATON'S
INTERNATIONAL LAW

[The Title-page of the Edition of 1866]

ELEMENTS
OF
INTERNATIONAL LAW.

By
HENRY WHEATON, LL.D.,

MINISTER OF THE UNITED STATES AT THE COURT OF PRUSSIA; CORRESPONDING
MEMBER OF THE ACADEMY OF MORAL AND POLITICAL SCIENCES IN THE
INSTITUTE OF FRANCE; HONORARY MEMBER OF THE ROYAL
ACADEMY OF SCIENCES AT BERLIN, ETC., ETC.

EIGHTH EDITION.

EDITED, WITH NOTES, BY
RICHARD HENRY DANA, JR., LL.D.

BOSTON:
LITTLE, BROWN, AND COMPANY.

1866.

Entered according to Act of Congress, in the year 1855, by
CATHERINE WHEATON,
in the Clerk's Office of the District Court of the District of Massachusetts.

Entered according to Act of Congress, in the year 1863, by
CATHERINE WHEATON,
in the Clerk's Office of the District Court of the District of Massachusetts.

Entered according to Act of Congress, in the year 1866, by
MARTHA B. WHEATON,
in the Clerk's Office of the District Court of the District of Massachusetts.

EDITOR'S PREFACE

As the text of this work may be supposed to have now become, by the death of Mr. Wheaton, unalterable, it has been thought judicious to adopt a new mode of division, for the greater convenience of reference. The text is accordingly divided into short sections, the numbering of which is continued through the book; so that hereafter, the sections being permanent and the text unaltered, the book may be cited by the sections, without regard to editions or to pages.

It was Mr. Wheaton's practice, in new editions, to revise his text, and not to put new matter into notes. It will be found, therefore, that his notes are short, and contain rarely any thing more than references to the authors discussed in the text.

This edition contains nothing but the text of Mr. Wheaton, according to his last revision, his notes, and the original matter contributed by the editor. Mr. Wheaton's notes are indicated by letters. The original contributions of the editor are all in the form of notes, which are indicated by numbers, enclosed in brackets, and signed with the letter D. For convenience in referring to the editor's notes, the numbering is continuous through the book.

It will not be expected, that this preface should furnish an extended biography of Mr. Wheaton; still less, that the editor should enter upon an analysis of his mind, or a eulogy of his merits and services. These have their appropriate places, in which all that his warmest admirers can wish has been said by those best qualified to speak of him.

Nothing more will be undertaken than it may be an assistance to the reader to have at hand,—a history of the work itself, and such a sketch of the author's life as will show his public relations, and in what circumstances and under what influences the book was written.

HENRY WHEATON was born in Providence, Rhode Island, Nov. 27, 1785.^[1] His family was one of the most respectable and influential in that State. His father was a merchant of high standing and competent fortune, and was able to give his son the advantages not only of a liberal education, but, what was not so common then as now, of early travel and study in Europe. Mr. Wheaton was educated at Providence College (now Brown University),^[11] where he took his degree in 1802. During the next three years, he studied law, and, in 1805, went abroad to complete his studies, and especially to make himself familiar with the languages, history, and literature of Europe. While in France, he gave attention to the subject of the codes, then greatly discussed, and to the international questions that attracted the attention of both

[¹ Original registry in Town Records, November 28, 1785.]—G.G.W.

[¹¹ Rhode Island College at Providence, founded 1764, became Brown University, 1804.]—G.G.W.

Editor's Preface

worlds; and his letters of introduction were such as to place him on intimate terms with the leading public men of his country then in Europe,—a position which he maintained by his own merits.

On his return to the United States, he entered on the practice of the law in the city of New York.⁽ⁱ⁾ Continuing his interest in international questions, he published, in 1815, his small work on the Law of Maritime Captures,⁽ⁱⁱ⁾ which gained him an early and lasting reputation. From 1816 to 1827, he was the reporter of the decisions of the Supreme Court of the United States, during what no one can be offended by hearing called the great period of the Federal Bench and Bar. The reporter was the friend and associate of the judges and the most eminent counsel; and, in respect to learning on foreign and international questions, and general culture, he held an enviable reputation throughout the country. In 1820, he delivered the annual address before the Historical Society of New York, taking for his subject the science of Public and International Law.⁽ⁱⁱⁱ⁾ This address, with his treatise on Captures, was the germ of his great work. For some time, he was engaged on a commission to revise the statute law of New York, during which he was a diligent student of the subject of codification, and of legislation generally. In 1827, he was appointed, by President Adams, Chargé d'Affaires at the court of Denmark, and resided at Copenhagen until 1835, when he was transferred to Berlin, first as Minister Resident,^(iv) but the office was afterwards raised to the rank of Plenipotentiary. This post he held until 1846, when his diplomatic career was closed by one of the most unfortunate sacrifices our government ever made to mere party routine.

Notwithstanding his long residence abroad, and at the courts of Europe, his patriotism suffered no diminution: but distance and absence seemed to present his country more as a unit, and with stronger hold on his imagination and affections; and he preserved not only with fidelity, but enthusiasm, the republican principles with which he began life.

Remaining a year in France, Mr. Wheaton returned to America in 1847. He was at once appointed Lecturer on International Law at Harvard University,^(v) and was to have had the professorship, then about to be founded and permanently endowed for him, of Civil and International Law: but rapidly declining health obliged him to break off from all his labors; and he died at Dorchester, in Massachusetts, on the 11th March, 1848.

During the twenty years that Mr. Wheaton resided abroad in the

⁽ⁱ⁾ Practised in Providence 1806–12; later in New York.]—G.G.W.

⁽ⁱⁱ⁾ *A Digest of the Law of Maritime Captures and Prizes*, New York, 1815.]—G.G.W.

⁽ⁱⁱⁱ⁾ The history of the science of public or international law.]—G.G.W.

^(iv) Chargé d'Affaires to Prussia, March 3, 1835; Envoy Extraordinary and Minister Plenipotentiary to Prussia, March 7, 1837.]—G.G.W.

^(v) Lecturer on Civil Law and the Law of Nations, October 30, 1847.]—G.G.W.

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diplomatic service, he was engaged in negotiations of great importance to his own country and Europe. He conducted the well-known controversy respecting the captures at Kiel, which ended in the Treaty of Indemnity of 1830 (see this work, §§ 530-537), and led the way to other treaties of indemnity to the United States, based on a similar principle. While at Copenhagen, he was practically the American representative for all Germany, as we had no minister in Prussia or Austria, or any other of the German States; and he gave constant attention to the internal concerns as well as the foreign policy of those powers. For many years he observed carefully the affairs of the Zollverein, and succeeded at last in effecting the treaty of 1844, which was thought by diplomatists and publicists to do him great honor, and the rejection of which by the United States Senate caused him no little regret,—the more, perhaps, from the fact that its defeat was understood to have been an accident of party politics, against the judgment of the ablest men of the country.

The reader of this book will see, at almost every stage in the questions of the last thirty years, traces of the labors of Mr. Wheaton, especially in the subjects of the abolition and capitalizing of the Sound Dues and the Scheldt Dues and the tolls on the Elbe, the extradition of criminals, and the lines of distinction established as to the exemption of naturalized citizens of the United States from certain claims of their former sovereigns. But there was scarcely a topic affecting the interests of his country, or the science of international and public law, or the political and social condition of his kind, in which he did not interest himself; contributing pamphlets to the press, articles to the leading journals of Europe and America, and maintaining a correspondence with the philosophical and literary societies on both sides of the Atlantic, of which he was an honored member. In 1831, he published his valuable *History of the Northmen*, which was afterwards published in French at Paris. In 1838 appeared the *History of Scandinavia*,—the joint work of himself and Dr. Crichton.

In 1841, Mr. Wheaton wrote an essay for a prize offered by the French Institute, on the subject, '*L'Histoire du Droit des Gens en Europe, depuis la Paix de Westphalie jusqu'au Congrès de Vienne.*' He afterwards enlarged it into a treatise on the *History of the Law of Nations in Europe and America*, from the earliest times to the treaty of Washington in 1842. This was published in English, in New York, in 1845,—the preface being dated at Paris in 1843; and in French, in 1846, at Leipsic and Paris.

To his great work, the *Elements of International Law*, Mr. Wheaton, in some form or other, gave the greater part of his life after his twenty-fifth year. For the duties of a commentator on that branch of science, he combined advantages which, in no one of his countrymen,

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were ever before united. He was familiar with the four languages in which the stores of international law are gathered. He had the early preparatory discipline successively of a practising lawyer, and a reporter of judicial decisions, followed by twenty years of diplomatic experience at one of the political centres of Europe. He maintained an intimate personal acquaintance and familiar correspondence with the most eminent statesmen, publicists, and scholars of Europe and America; and kept himself thoroughly informed of the current history of whatever bore upon the relations of States. In short, he combined the advantages of the discipline of a barrister, the culture of a scholar, the experience of a diplomatist, and the habits of a man of society. And it is no small thing to add, that, to a subject essentially moral, he brought a purity of nature, candor, and fidelity to truth and duty, as remarkable as his learning, industry, and philosophy.

This work, under the title of *The Elements of International Law*, was first sent to the press in 1836, in two editions,—one at Philadelphia, and the other at London; the preface being written at Berlin, and dated Jan. 1, 1836.

The third edition was published in Philadelphia in 1846; the preface being dated at Berlin, November, 1845.

In 1846 and 1847, Mr. Wheaton prepared an edition in French; the preface being dated at Paris, April 15, 1847, just before his final return to America. It was published at Leipsic and Paris, in 1848,—the year of the author's death.

A second edition of the work, in French, was published at the same places in 1853.^[i]

The next foreign edition^[ii] conferred a singular distinction upon the author: it was a translation into Chinese, executed and published in 1864, under the auspices of the Imperial Government.^[iii] See note 8.

In 1855, an edition, which has always been called the sixth edition (counting the French editions as the fourth and fifth), was prepared in Boston, with notes by Mr. W. B. Lawrence.

In 1863, the seventh edition was published in Boston,^[iv] also with notes by Mr. Lawrence.

The present is therefore the eighth edition. The notes of Mr. Lawrence do not form any part of this edition. It is confined, as has been said, to the text and notes of the author, and the notes of the present editor, who undertakes his work at the request of the widow of Mr. Wheaton, recently deceased, and of his only surviving children, his daughters.

[ⁱ The correct date of the second French edition is 1852. Third and fourth editions in French, 1858 and 1864.]—G.G.W.

[ⁱⁱ For other foreign editions prior to 1864, see *Chronological List of Editions*, post, p. 607.]—G.G.W.

[ⁱⁱⁱ Chinese edition republished at Yeddo, 1865.]—G.G.W.

[^{iv} London and Boston, 1864.]—G.G.W.

Editor's Preface

Adhering to the course proposed, no attempt is made to discuss the character of this work, or to enter upon an examination of the more strictly literary labors of the distinguished jurist; still less, to report the tributes which have been paid to him by bodies politic, literary and scientific societies, or eminent individuals. Yet, among the honors his memory has received, one may be selected for mention, as peculiarly gratifying. His native State has resolved to place his statue in the Capitol of the Union, as one of the two assigned to it in the gallery of the public men of America.

The son of Mr. Wheaton, who gave so fair promise of continuing the honor of his name in another generation, survived him but a few years. Yet it is hoped that too much is not claimed in expressing a belief, that his name will still remain so long as the science which regulates the relations of States shall be studied among men.

RICHARD H. DANA, JR.

BOSTON,
July 2, 1866.

P R É F A C E

A L'ÉDITION DE 1848. PARIS ET LEIPZIG

LA première édition de cet ouvrage a paru à Londres, en 1836, en anglais, et a passé par deux autres éditions dans la même langue, publiées à Philadelphie, et revues, corrigées, et considérablement augmentées par l'auteur. En écrivant cet ouvrage, il s'est proposé de réunir dans un livre élémentaire, destiné à l'usage des diplomates et des hommes d'état, l'ensemble des règles de conduite qui doivent être observées dans les relations mutuelles des nations, en temps de paix et en temps de guerre. Le droit international, ou droit des gens positif, est fondé sur la morale internationale, qu'on a ordinairement appelée le droit des gens naturel. La plupart des règles dont se compose le droit international, sont tirées des exemples de ce qui, dans la pratique variable des nations civilisées, a été approuvé par le jugement impartial des publicistes et des tribunaux internationaux. Ces précédents se sont accrus en nombre et en importance durant la longue période qui s'est écoulée depuis la publication de l'ouvrage classique et justement estimé de Vattel, période abondante en discussions instructives entre les cabinets et dans les tribunaux et les assemblées législatives de diverses nations concernant leurs relations politiques et leurs devoirs mutuels. L'auteur a puisé à ces sources les principes généraux qu'on peut regarder comme ayant reçu l'assentiment de la portion la plus éclairée du genre humain, sinon comme règles de conduite invariables, du moins comme règles qu'aucun état ne peut violer sans encourir l'opprobre général, et sans s'exposer au danger de provoquer les hostilités d'autres états indépendants dont les droits seraient lésés, ou dont la sécurité serait menacée par leur violation. L'expérience démontre que ces motifs fournissent une certaine garantie, même dans les temps les plus malheureux, pour l'observation des règles de justice internationale, s'ils n'accordent pas cette sanction parfaite que le législateur a annexée au droit interne de chaque état particulier. La connaissance du droit public externe a donc toujours été regardée comme étant de la plus grande utilité à tous ceux qui prennent part aux affaires publiques, et surtout à ceux qui sont destinés à la carrière diplomatique. L'auteur a été encouragé par la faveur accordée par le public aux éditions précédentes de son ouvrage à faire publier cette nouvelle édition en langue française.

H. WHEATON.

PARIS,
le 15 Avril, 1847.

PREFACE TO THE THIRD EDITION

SINCE the publication of the two former editions of the present Treatise, the Author has submitted to the public judgment another work connected with the same subject, and entitled 'History of the Law of Nations in Europe and America, from the earliest Times to the Treaty of Washington, 1842.' In the present edition of the 'Elements of International Law,' constant reference has been had to this historical deduction, in which the Author endeavored to trace the origin and progress of those rules of international justice so long acknowledged to exist, and which have been more or less perfectly observed by the Christian nations of modern Europe; which have been adopted by their descendants in the New World, from the first planting of European colonies on the American Continents; and have been more recently applied to regulate the relations of the European and American nations with the Mohammedan and Pagan races of the other quarters of the globe.

The law of nations acknowledged by the ancient Greeks and Romans was exclusively founded on religion. The laws of peace and war, the inviolability of heralds and ambassadors, the right of asylum, and the obligation of treaties, were all consecrated by religious principles and rites. Ambassadors, heralds, and fugitives who took refuge in the temples, or on the household hearth, were deemed inviolable, because they were invested with a sacred character and the symbols of religion. Treaties were sanctioned with solemn oaths, the violation of which it was believed must be followed by the vengeance of the gods. War between nations of the same race and religion was declared with sacred rites and ceremonies. The heralds proclaimed its existence by devoting the enemy to the infernal deities. 'Eternal war against the Barbarians,' was the Shibboleth of the most civilized and enlightened people of antiquity. Among the Romans 'stranger' and 'enemy' were synonymous. *Adversus hostem æterna auctoritas esto* was the maxim of the Twelve Tables, and Justinian considered all nations as enemies unless they were the allies of Rome. More permanent relations could exist only between nations of the same origin, and professing the religious faith common to the entire race. Such were the Hellenic tribes represented in the great Amphictyonic council of Greece, which was rather a religious than a political institution. But even the purest moralists hardly admitted any other duties between the Greeks themselves than such as were founded on positive compact.

The introduction of Christianity tended to abolish the Pagan precept: 'Thou shalt hate thine enemy,' and to substitute for it the benevolent command: 'Love your enemies,' which could not be

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reconciled with perpetual hostility between the different races of men. But this milder dispensation long struggled in vain against the secular enmity of the different nations of the ancient world, and that spirit of blind intolerance which darkened the ages succeeding the fall of the Roman Empire. During the Middle Ages the Christian States of Europe began to unite, and to acknowledge the obligation of an international law common to all who professed the same religious faith. This law was founded mainly upon the following circumstances:—

First: The union of the Latin Church under one spiritual head, whose authority was often invoked as the supreme arbiter between sovereigns and between nations. Under the auspices of Pope Gregory IX., the canon law was reduced into a code, which served as the rule to guide the decisions of the Church in public as well as private controversies.

Second: The revival of the study of the Roman law, and the adoption of this system of jurisprudence by nearly all the nations of Christendom, either as the basis of their municipal codes, or as subsidiary to the local legislation in each country.

The origin of the law of nations in modern Europe may thus be traced to these two principal sources,—the canon law and the Roman civil law. The proofs of this double origin may be distinctly discovered in the writings of the Spanish casuists and the professors of the celebrated University of Bologna. Each general council of the Catholic Church was a European Congress, which not only deliberated on ecclesiastical affairs, but also decided the controversies between the different States of Christendom. The professors of the Roman law were the public jurists and diplomatic negotiators of the age. The writers on the law of nations before the time of Grotius, such as Francis de Victoria, Balthazar Ayala, Conrad Brunus, and Albericus Gentilis, fortified their reasonings by the authority of the Roman civilians and the canonists. The great religious revolution of the sixteenth century undermined one of the bases of this universal jurisprudence: but the public jurists of the Protestant school, whilst they renounced the authority of the Church of Rome and the canon law, still continued to appeal to the Roman civil law, as constituting the general code of civilized nations.

The establishment of the system of a balance of power among the European States also contributed to form the international law recognized by them. The idea of this system, though not wholly unknown to the statesman of antiquity, had never been practically applied to secure the independence of nations against the ambition of the great military monarchies by which the civilized world was successively subdued. The modern system of the balance of power was first developed among the States of Italy during the latter part of the fifteenth cen-

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tury, and was applied, in the first instance, in order to maintain their mutual independence, and, subsequently, to unite them all against the invasions of the transalpine nations. Such was the policy of the Republic of Florence under Cosmo and Lorenzo de Medici, and such was the object of Machiavelli in writing his celebrated treatise of the *Prince*. Unfortunately for his own fame, and for the permanent interests of mankind, this masterly writer, in his patriotic anxiety to secure his country against the dangers with which it was menaced from the *Barbarians*, did not hesitate to resort to those atrocious means already too familiar to the domestic tyrants of Italy. The violent remedies he sought to apply for her restoration to pristine greatness were poisons, and his book became the manual of despotism, in which Philip II. of Spain, and Catherine de Medici found their detestable maxims of policy. But policy can never be separated from justice with impunity. Sound policy can never authorize a resort to such measures as are prohibited by the law of nations, founded on the principles of eternal justice; and, on the other hand, the law of nations ought not to prohibit that which sound policy dictates as necessary to the security of any State. 'Justice,' says Burke, 'is the great standing policy of civil society, and any eminent departure from it, under any circumstances, lies under the suspicion of being no policy at all.'

Whatever may be thought of the long-disputed question as to the motives of Machiavelli in writing, his work certainly reflects the image of that dark and gloomy period of European society, presenting one mass of dissimulation, crime, and corruption, which called loudly for a great teacher and reformer to arise, who should stay the ravages of this moral pestilence, and speak the unambiguous language of truth and justice to princes and people. Such a teacher and reformer was Hugo Grotius, whose treatise on the *Laws of Peace and War*, produced a strong impression on the public mind of Christian Europe, and gradually wrought a most salutary change in the practical intercourse of nations in favor of humanity and justice. Whatever defects may be justly imputed to the works of Grotius, and the public jurists formed in his school, considered as scientific, expository treatises, it would be difficult to name any class of writers which has contributed more to promote the progress of civilization than 'these illustrious authors—these friends of human nature—these kind instructors of human errors and frailties—these benevolent spirits who held up the torch of science to a benighted world.'¹ If the international intercourse of Europe, and the nations of European descent, has been since marked by superior humanity, justice, and liberality, in comparison with the usage of the other branches of the human family, this glorious superiority must be mainly attributed to these private teachers of justice, to whose moral

¹ Patrick Henry.

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authority Sovereigns and States are often compelled to bow, and whom they acknowledge as the ultimate arbiters of their controversies in peace; whilst the same authority contributes to give laws even to war itself, by limiting the range of its operations within the narrowest possible bounds consistent with its purposes and objects.

It has been observed by Sir James Mackintosh, that, without overrating the authority of this class of writers, or without considering authority in any case as a substitute for reason, the public jurists may justly be considered as entitled to great weight as impartial witnesses bearing testimony to the general sentiments and usages of civilized nations. Their testimony receives additional confirmation every time their authority is invoked by statesmen, and from the lapse of every successive year in which the current of this authority is uninterrupted by the avowal and practice of contrary principles and usages. Add to which, that their judgments are usually appealed to by the weak, and are seldom rejected except by those who are strong enough to disregard all the principles and rules of international morality. "The opinions of these eminent men," says Mr. Fox, "formed without prejudice upon subjects which they have carefully studied, under circumstances the most favorable to an impartial judgment, cannot but be considered as entitled to the highest respect. The maxims laid down by them are uninfluenced by national prejudices or particular interests; they reason upon great principles and with enlarged views of the welfare of nations; and by comparing the results of their own reflections with the lessons taught by the experience of preceding ages, they have established that system which they considered as of the greatest utility and of the most general application."¹

The rules of international morality recognized by these writers are founded on the supposition, that the conduct which is observed by one nation towards another, in conformity with these rules, will be reciprocally observed by other nations towards it. The duties which are imposed by these rules are enforced by moral sanctions, by apprehension on the part of sovereigns and nations of incurring the hostility of other States, in case they should violate maxims generally received and respected by the civilized world. These maxims may, indeed, be violated by those who choose to suffer the consequences of that hostility; but they cannot be violated with impunity, nor without incurring general obloquy. The science which teaches the reciprocal duties of sovereign States is not, therefore, a vain and useless study, as some have pretended. If it were so, the same thing might be affirmed of the science of private morality, the duties inculcated by which are frequently destitute of the sanction of positive law, and are enforced

¹ Mackintosh, *Hansard's Parl. Deb.* vol. xxx. p. 894; Fox, *Parl. Hist. of England*, vol. xxx. p. 1260.

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merely by conscience and social opinion. As the very existence of social intercourse in private life depends upon the observance of these duties, so the existence of that mutual intercourse among nations, which is so essential to their happiness and prosperity, depends upon the rules which have generally been adopted by the great society of nations to regulate that intercourse.

In preparing for the press the present edition of the *Elements of International Law*, the work has been subjected to a careful revision, and has been considerably augmented. The Author has endeavored to avail himself of the most recent questions which have occurred in the intercourse of States, the discussion and decision of which have contributed to throw new light upon that system of rules by which all civilized nations profess to be bound in their mutual intercourse. He has especially sought for those sources of information in the diplomatic correspondence and judicial decisions of our own country, which form a rich collection of instructive examples, arising out of the peculiar position of the United States during the wars of the French Revolution, and during the war declared by them against Great Britain, in 1812. That international law, common to all civilized and Christian nations, which our ancestors brought with them from Europe, and which was obligatory upon us whilst we continued to form a part of the British Empire, did not cease to be so when we declared our independence of the parent country. Its obligation was acknowledged by the Continental Congress, in the ordinances published by that illustrious assembly for the regulation of maritime captures, and by the Court of Appeals, established for the adjudication of prize causes during the War of the Revolution. In the mean time, the United States had recognized, in their treaty of alliance with France, those principles respecting the rights of neutral commerce and navigation which subsequently became the basis of the armed neutrality of the northern powers of Europe. The American government has ever since constantly recognized and respected the same principles towards those maritime States by whom they are reciprocally recognized and respected. As to all others, it continues to observe the pre-existing rules of the ancient law of nations, whilst it has ever shown itself ready to adopt measures for mitigating the practices of war, and rendering them more conformable to the spirit of an enlightened age.

The Author has also endeavored to justify the confidence with which he has been so long honored by his country in the different diplomatic missions confided to him, by availing himself of the peculiar opportunities, and the means of information thus afforded, for a closer examination of the different questions of public law which have occurred in the international intercourse of Europe and America, since the publication of the first edition of the present work. Among these

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questions are those relating to the exercise of the right of search for the suppression of the African slave-trade, and to the interference of the five great European powers in the internal affairs of the Ottoman Empire. The former of these questions had already been discussed by the Author, in a separate treatise, published in 1841, in which the immunity of the national flag from every species and purpose of search, by the armed vessels of another State, in time of peace, except in virtue of a special compact, was maintained by an appeal to the oracles of public law both of Great Britain and the United States, and has since been solemnly sanctioned by the treaty of Washington, 1842, and by the convention concluded, during the present year, between France and Great Britain, for the suppression of the mutual right of search conceded by former treaties. He indulges the hope that these additions to the work may be found to render it more useful to the reader, and make it more worthy of the favor with which the previous editions have been received.

BERLIN,
November, 1845.

ADVERTISEMENT TO THE FIRST EDITION

THE object of the Author in the following attempt to collect the rules and principles which govern, or are supposed to govern, the conduct of States in their mutual intercourse in peace and in war, and which have therefore received the name of International Law, has been to compile an elementary work for the use of persons engaged in diplomatic and other forms of public life, rather than for mere technical lawyers, although he ventures to hope that it may not be found wholly useless even to the latter. The great body of the rules and principles which compose this Law is commonly deduced from examples of what has occurred, or been decided in the practice and intercourse of nations. These examples have been greatly multiplied in number and interest during the long period which has elapsed since the publication of Vattel's highly appreciated work: a portion of human history abounding in fearful transgressions of that Law of Nations which is supposed to be founded on the higher sanction of the Natural Law, (more properly called the Law of God,) and at the same time rich in instructive discussions in cabinets, courts of justice, and legislative assemblies, respecting the nature and extent of the obligations between the independent societies of men called States. The principal aim of the Author has been to glean from these sources the general principles which may fairly be considered to have received the assent of most civilized and Christian nations, if not as invariable rules of conduct, at least as rules which they cannot disregard without general obloquy and the hazard of provoking the hostility of other communities who may be injured by their violation. Experience shows that these motives, even in the worst times, do really afford a considerable security for the observance of justice between States, if they do not furnish the perfect sanction annexed by the lawgiver to the observance of the municipal code of any particular State. The knowledge of this science has, consequently, been justly regarded as of the highest importance to all who take an interest in political affairs. The Author cherishes the hope that the following attempt to illustrate it will be received with indulgence, if not with favor, by those who know the difficulties of the undertaking.

BERLIN,

January 1, 1836.

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[¹ The citation of this case is given in the first footnote (a) on page 338 of the text by Wheaton, but the case is not mentioned by name.]—G. G. W.

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[¹ This refers to the notes of R. H. Dana, Jr.]—G. G.W.

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[¹ For 196 read 198.]—G. G. W.

[1]
ELEMENTS OF INTERNATIONAL LAW

[3] PART FIRST

DEFINITION, SOURCES, AND SUBJECTS OF INTERNATIONAL LAW

CHAPTER I

DEFINITION AND SOURCES OF INTERNATIONAL LAW

§ 1. THERE is no legislative or judicial authority, recognized by all nations, which determines the law that regulates the reciprocal relations of States. The origin of this law must be sought in the principles of justice, applicable to those relations. While in every civil society or State there is always a legislative power which establishes, by express declaration, the civil law of that State, and a judicial power, which interprets that law, and applies it to individual cases, in the great society of nations there is no legislative power, and consequently there are no express laws, except those which result from the conventions which States may make with one another. As nations acknowledge no superior, as they have not organized any common paramount authority, for the purpose of establishing by an express declaration their international law, and as they have not constituted any sort of Amphictyonic magistracy to interpret and apply that law, it is impossible that there should be a code of international law illustrated by judicial interpretations.

Origin of
International
Law.

The inquiry must then be, what are the principles of justice which ought to regulate the mutual relations of nations, that is to say, from what authority is international law derived.

When the question is thus stated, every publicist will decide it according to his own views, and hence the fundamental differences which we remark in their writings.

[4] § 2. The leading object of Grotius, and of his immediate disciples and successors, in the science of which he was the founder, seems to have been, *First*, to lay down those rules of justice which would be binding on men living in a social state, independently of any positive laws of human institution; or, as is commonly expressed, living together in a *state of nature*; and,

Natural Law
defined.

Secondly, To apply those rules, under the name of Natural Law, to the mutual relations of separate communities living in a similar state with respect to each other.

With a view to the first of these objects, *Grotius* sets out in his work, on the rights of war and peace, (*de jure belli ac pacis*,) with refuting the doctrine of those ancient sophists who wholly denied the reality of moral distinctions, and that of some modern theologians, who

asserted that these distinctions are created entirely by the arbitrary and revealed will of God, in the same manner as certain political writers, (such as Hobbes,) afterwards referred them to the positive institution of the civil magistrate. For this purpose, Grotius labors to show that there is a law audible in the voice of conscience, enjoining some actions, and forbidding others, according to their respective suitableness or repugnance to the reasonable and social nature of man. 'Natural law,' says he, 'is the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitableness or repugnance to the rational and social nature, and that, consequently, such actions are either forbidden or enjoined by God, the Author of nature. Actions which are the subject of this exertion of reason, are in themselves lawful or unlawful, and are, therefore, as such necessarily commanded or prohibited by God.' (a)

Natural Law
identical
with the law
of God, or
Divine Law.

§ 3. The term Natural Law is here evidently used for those rules of justice which ought to govern the conduct of men, as moral and accountable beings, living in a social state, independently of positive human institutions, [5] (or, as is commonly expressed, living in a state of nature,) and which may more properly be called the law of God, or the divine law, being the rule of conduct prescribed by Him to his rational creatures, and revealed by the light of reason, or the sacred Scriptures.¹

Natural Law
applied to
the inter-
course of
States.

As independent communities acknowledge no common superior, they may be considered as living in a state of nature with respect to each other: and the obvious inference drawn by the disciples and successors of Grotius was, that the disputes arising among these independent communities must be determined by what they call the Law of Nature. This gave rise to a new and separate branch of the science, called the Law of Nations, *Jus Gentium*.²

Law of
Nations dis-
tinguished
from Natural
Law, by
Grotius.

§ 4. Grotius distinguished the law of nations from the natural law by the different nature of its origin and obligation, which he attributed to the general consent of nations. In the introduction to his great work, he says, 'I have used in favor of this law, the testimony of philosophers, historians, poets, and even of orators; not that they are in-

(a) 'Jus naturale est dictatum rectæ rationis indicans actui alicui, ex ejus convenientiâ aut disconvenientiâ cum ipsâ naturâ rationali, inesse moralem turpitudinem, aut necessitatem moralem, ac consequenter ab auctore naturæ Deo talem actum aut vetari aut præcipi.

'Actus de quibus tale extat dictatum, debiti sunt aut illiciti per se, atque ideo à Deo necessario præcepti aut vetiti intelliguntur.' Grotius, de Jur. Bel. ac Pac. lib. i. cap. i, § x. 1, 2.

[¹ In Maine's Ancient Law, 52-58, 73-96, will be found a full and learned discussion of the *jus gentium* of the Romans, and the *jus naturale*, in its technical sense, with the latest lights thrown on them by historical researches.]—D.

[² Maine's Ancient Law, 47-59; Twiss's Intern. Law, 2, 3; Marezzoll, Lehrbuch der Inst. des röm. Rechtes, § 15; Woolsey's Introduction, §§ 3, 4, 9, 10.]—D.

discriminately to be relied on as impartial authority; since they often bend to the prejudices of their respective sects, the nature of their argument, or the interest of their cause; but because where many minds of different ages and countries concur in the same sentiment, it must be referred to some general cause. In the subject now in question, this cause must be either a just deduction from the principles of natural justice, or universal consent. The first discovers to us the natural law, the second the law of nations. In order to distinguish these two branches of the same science, we must consider, not merely the terms which authors have used to define them, (for they often confound the terms *natural law* and *law of nations*;) but the nature of the subject in question. For if a certain maxim which cannot be fairly inferred from admitted principles is, nevertheless, found to be everywhere observed, there is reason to conclude that it derives its origin from positive institution.' He had previously said, 'As [6] the laws of each particular State are designed to promote its advantage, the consent of all, or at least the greater number of States, may have produced certain laws between them. And, in fact, it appears that such laws have been established, tending to promote the utility, not of any particular State, but of the great body of these communities. This is what is termed the Law of Nations, when it is distinguished from Natural Law.'^(a)³

All the reasonings of Grotius rest on the distinction, which he makes between the natural and the positive or voluntary Law of Nations. He derives the first element of the Law of Nations from a supposed condition of society, where men live together in what has been called a state of nature. That natural society has no other superior but God, no other code than the divine law engraved in the heart of man, and announced by the voice of conscience. Nations living together in such a state of mutual independence must necessarily be governed by this same law. Grotius, in demonstrating the accuracy

(a) 'Usus sum etiam ad juris hujus probationem testimoniis philosophorum, historicorum, poetarum, postremo et oratorum; non quod illis indiscretè credendum sit; solent enim sectæ, argumento, causæ servire: sed quòd ubi multi diversis temporibus at locis idem pro certo affirmant, id ad causam universalem referri debeat; quæ in nostris quæstionibus alia esse non potest quàm aut recta illatio ex naturæ principiis procedens, aut communis aliquis consensus. Illa jus naturæ indicat, hic jus gentium: quorum discrimen non quidem ex ipsis testimoniis, (passim enim scriptores voce⁽¹⁾ *juris naturæ*, et *gentium* permiscunt,) sed ex materiæ qualitate intelligendum est. Quod enim ex certis principiis certâ argumentatione deduci non potest, et tamen ubique observatum apparet, sequitur ut ex voluntate liberâ ortum habeat.' . . . 'Sed sicut cujusque civitatis jura utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes aut plerasque ex consensu jura quædam nasci potuerunt; et nata apparent, quæ utilitatem respicerent non cœtum singulorum sed magnæ illius universitatis. Et hoc jus est quod gentium dicitur, quoties id nomen à jure naturali distinguimus.' Grotius, de Jur. Bel. ac Pac. Prolegom. 40, 17.

[³ Woolsey's Introd. § 11; Maine's Ancient Law, 114.]—D.

[¹ For voce read voces.]—G.G.W.

of his somewhat obscure definition of Natural Law, has given proof of a vast erudition, as well as put us in possession of all the sources of his knowledge. He then bases the positive or voluntary Law of Nations on the consent of all nations, or of the greater part of them, to observe certain rules of conduct in their reciprocal relations. He has endeavored to demonstrate the existence of these rules by invoking the same authorities, as in the case of his definition of Natural Law. We thus see on what fictions or hypotheses Grotius has founded the whole Law of Nations. But it is evident that his supposed state of nature has never existed. As to the general consent of nations of which he speaks, it can at most be considered a tacit consent, like the *jus non scriptum quod consensus facit* of the Roman juriconsults. This consent can only be established by the disposition, more or less uniform, of nations to observe among themselves the rules of international justice, recognized by the publicists. Grotius would, undoubtedly, have done better had he sought the origin of the Natural Law of Nations in the principle of utility, vaguely indicated by Leibnitz,^(b) but clearly expressed and adopted by Cumberland,^(c) and admitted by almost all subsequent writers, as the test of international morality.^(d) But in the time that Grotius wrote, this principle which has so greatly contributed to dispel the mist with which the foundations of the science of International Law were obscured, was but very little understood. The principles and details of international morality, as distinguished from international law, are to be obtained not by applying to nations the rules which ought to govern the conduct of individuals, but by ascertaining what are the rules of international conduct which, on the whole, best promote the general happiness of mankind. The means of this inquiry are observation and meditation; the one furnishing us with facts, the other enabling us to discover the connection of these facts as causes and effects, and to predict the results which will follow, whenever similar causes are again put into operation.^(e)

§ 5. Neither Hobbes nor Puffendorf entertains the same opinion as Grotius upon the origin and obligatory force of the positive Law of Nations. The former, in his work, *De Cive*, says, "The natural law may be divided into the natural law of men, and the natural law of States,"

(b) Et jus quidem merum sive strictum nascitur ex principio servandæ pacis; æquitas sive caritas ad majus aliquid contendit, ut dum quisque alteri prodest quantum potest, felicitatem suam augeat in aliena; et ut verbo dicam, jus strictum miseriam vitat, jus superius ad felicitatem tendit, sed qualis in hanc mortalitatem cadit. Leibnitz, *de Usu Actorum Publicorum*,⁽¹⁾ § 13.

(c) Lex naturæ est propositio naturaliter cognita, actiones indicans effectrices communis boni. Cumberland, *de Legibus Naturæ*, cap. v. § 1.

(d) Bentham's *Principles of International Law*. Works, Part VIII. 537. Edit. Bowring.

(e) Senior, *Edinburgh Review*, No. 156, pp. 310, 321.

[¹ *For de Usu Actorum Publicorum read de Actorum publicorum usu.*]—G.G.W.

commonly called the Law of Nations. The precepts of both are the same; but since States, when they are once instituted, assume the [8] personal qualities of individual men, that law, which when speaking of individual men we call the Law of Nature, is called the Law of Nations when applied to whole states, nations, or people.'^(a)⁴ To this opinion *Puffendorf* implicitly subscribes, declaring that 'there is no other voluntary or positive law of nations properly invested with a true and legal force, and binding as the command of a superior power.'^(b)

After thus denying that there is any positive or voluntary law of nations founded on the consent of nations, and distinguished from the natural law of nations, *Puffendorf* proceeds to qualify this opinion by admitting that the usages and comity of civilized nations have introduced certain rules, for mitigating the exercise of hostilities between them; that these rules are founded upon a general tacit consent; and that their obligation ceases by the express declaration of any party, engaged in a *just war*, that it will no longer be bound by them. There can be no doubt that any belligerent nation which chooses to withdraw itself from the obligation of the Law of Nations, in respect to the manner of carrying on war against another State, *may* do so at the risk of incurring the penalty of vindictive retaliation on the part of other nations, and of putting itself in general hostility with the civilized world. As a celebrated English civilian and magistrate (Lord Stowell) has well observed, 'a great part of the law of nations stands upon the usage and practice of nations. It⁽¹⁾ is introduced, indeed, by general principles, but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go further, and say that mere general speculations would bear you out in a further progress; thus, for instance, on mere general principles, it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some, and prohibits [9] other modes of destruction; and a belligerent is bound to confine himself to those modes

(a) *Præcepta utriusque eadem sunt; sed quia civitates semel institutæ inducunt⁽¹¹⁾ proprietates hominum personales, lex quam, loquentes de hominum singulorum officio, naturalem dicimus, applicata totis civitatibus, nationibus sive gentibus, vocatur jus gentium.* Hobbes, *De Cive*, cap. xiv. § 4.

(b) *Cui sententiæ et nos plane subscribimus. Nec præterea aliud jus gentium voluntarium seu positivum dari arbitramur,⁽¹¹¹⁾ quod quidem legis propriæ^(1v) dictæ vim habeat, quæ gentes tamquam à superiore profecta stringat.* *Puffendorf*, *De Jure Naturæ et Gentium*, lib. ii. cap. 3, § 23.

[⁴ *Maine's Ancient Law*, 114; *Woolsey's Introd.* § 12.]—D.

[¹ *For* stands upon the usage and practice of nations. It *read* stands on no other foundation: it.]—G.G.W.

[¹¹¹ *For* arbitramur *read* arbitramur.]—G.G.W.

[^{1v} *For* propriæ *read* propriæ.]—G.G.W.

[¹¹ *For* inducunt *read* induunt.]—G.G.W.

which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes.^(c)

The same remark may be made as to what Puffendorf says respecting the privileges of ambassadors, which Grotius supposes to depend upon the voluntary law of nations; whilst Puffendorf says they depend, either upon natural law which gives to public ministers a sacred and inviolable character, or upon tacit consent, as evidenced in the usage of nations, conferring upon them certain privileges which may be withheld at the pleasure of the State where they reside. The distinction here made between those privileges of ambassadors, which depend upon natural law, and those which depend upon custom and usage, is wholly groundless; since both one and the other may be disregarded by any State which chooses to incur the risk of retaliation or hostility, these being the only sanctions by which the duties of international law can be enforced.

Still it is not the less true that the law of nations, founded upon usage, considers an ambassador, duly received in another State, as exempt from the local jurisdiction by the consent of that State, which consent cannot be withdrawn without incurring the risk of retaliation, or of provoking hostilities on the part of the sovereign by whom he is delegated. The same thing may be affirmed of all the usages which constitute the Law of Nations. They may be disregarded by those who choose to declare themselves absolved from the obligation of that law, and to incur the risk of retaliation from the party specially injured by its violation, or of the general hostility of mankind.^(d)⁵

Law of Nations derived from reason and usage.

[10] § 6. *Bynkershoek*, (who wrote after Puffendorf, and before Wolf and Vattel,) derives the law of nations from reason and usage, (*ex ratione et usu*.) and founds usage on the evidence of treaties and ordinances, (*pacta et edicta*.) with the comparison of examples frequently recurring. In treating of the rights of neutral navigation in time of war, he says, 'Reason commands me to be equally friendly to two of my

(c) Robinson's Admiralty Rep. i. 140.

(d) Wheaton's History of the Law of Nations, 96.

⁵ 'Puffendorf commits the mistake⁽¹⁾ of failing to distinguish sufficiently between natural justice and the law of nations; of spinning the web of a system out of his own brain, as if he were the legislator of the world; and of neglecting to inform us what the world actually holds to be the law by which nations regulate their intercourse.' Woolsey's Introd. § 12.

'Puffendorf entirely denies the authority of general usage; and his doctrine, putting aside the mass of words that encumbers⁽¹¹⁾ it, amounts to this: that the rules of abstract propriety, resting merely on unauthorized speculations, and applied to international transactions, constitute international law, and acquire no additional authority when, by the usage of nations, they have been generally received and approved of.' Wildman's Institutes, i. 28. See also Maine's Ancient Law, 96-112.]—D.

¹ For mistake read faults.]—G.G.W.

¹¹ For that encumbers read with which he has encumbered.]—G.G.W.

friends who are enemies to each other; and hence it follows that I am not to prefer either in war. Usage is shown by the constant, and, as it were, perpetual custom which sovereigns have observed of making treaties and ordinances upon this subject, for they have often made such regulations by treaties to be carried into effect in case of war, and by laws enacted after the commencement of hostilities. I have said *by, as it were, a perpetual custom*; because one, or perhaps two treaties, which vary from the general usage, do not alter the law of nations.'^(a)

In treating of the question as to the competent judicature in cases affecting ambassadors, he says, 'The ancient jurisconsults assert, that the law of nations is that which is observed in accordance with the light of reason, between nations, if not among all, at least certainly among the greater part, and those the most civilized. According to my opinion, we may safely follow this definition, which establishes two distinct bases of this law; namely, reason and custom. But in whatever manner we may define the law of nations, and however we may argue upon it, we must come at last to this conclusion, that what reason dictates to nations, and what nations observe between each other, as a consequence of the collation of cases frequently recurring, is the only law of those who are not governed by any other—(*unicum jus sit eorum qui alio jure non reguntur.*) If all men are men, that is to say, if they make use of their reason, it must counsel and command them certain things which they ought to observe as if by mutual consent, and which being afterwards established by usage, impose upon nations a reciprocal obligation; without which law, we can neither conceive of war, nor peace, nor alliances, nor embassies, nor commerce.'^(b) Again, he says, treating the same question: 'The Roman and pontifical law can hardly furnish a light to guide our steps; the entire question must be determined by reason and the usage of nations. I have alleged whatever reason can adduce for or against the question; but we must now see what usage has approved, for that must prevail, since the law of nations is thence derived.'^(c) In a subsequent passage of the same treatise, he says, 'It is nevertheless most true, that the States-General of Holland alleged, in 1651, that, according to the law of nations, an ambassador cannot be arrested, though guilty of a criminal offence;

(a) '*Jus Gentium commune in hanc rem non aliunde licet dicere,*⁽¹⁾ *quàm ex ratione et usu. Ratio jubet ut duobus, invicem hostibus, sed mihi amicis, æque amicus sim; et inde efficitur, ne in causâ belli alterum præferam.*⁽¹¹⁾ *Usus intelligitur ex perpetuâ quadammodo paciscendi edicendique consuetudine; pactis enim Principes sæpe id egerunt in casu*⁽¹¹¹⁾ *belli, sæpe etiam edictis contra quoscunque, flagrante jam bello. Dixi, ex perpetuâ quadammodo consuetudine, quia unum fortè alterumve pactum, quod a consuetudine recedit, Jus Gentium non mutat.*' Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10.

(b) De Foro Legatorum, cap. iii. § 10.

(c) Ibid. cap. vii. § 8.

[¹ For dicere read discere.]—G.G.W.

[¹¹ For alterum præferam read alterum alteri præferam.]—G.G.W.

[¹¹¹ For casu read casum.]—G.G.W.

and equity requires that we should observe that rule, unless we have previously renounced it. The law of nations is only a presumption founded upon usage, and every such presumption ceases the moment the will of the party who is affected by it is expressed to the contrary. Huberus asserts that ambassadors cannot acquire or preserve their rights by prescription; but he confines this to the case of subjects who seek an asylum in the house of a foreign minister, against the will of their own sovereign. I hold the rule to be general as to every privilege of ambassadors, and that there is no one they can pretend to enjoy against the express declaration of the sovereign, because an express dissent excludes the supposition of a tacit consent, and there is no law of nations except between those who voluntarily submit to it by tacit convention.'(d)

System of
Wolf.

§ 7. The public jurists of the school of Puffendorf had considered the science of international law as a branch of the science of ethics. They had considered it as the natural law of individuals applied to regulate the conduct of independent societies of men, called States. To Wolf belongs, according to Vattel, the credit of separating the law of nations from that part of natural jurisprudence which treats of the duties of individuals.

In the preface of his great work, he says, "That since such is the condition of mankind that the strict law of nature cannot always be applied to the government of a particular community, but it becomes necessary to resort to laws of positive institution [12] more or less varying from the natural law, so in the great society of nations it becomes necessary to establish a law of positive institution more or less varying from the natural law of nations. As the common welfare of nations requires this mutation, they are not less bound to submit to the law which flows from it than they are bound to submit to the natural law itself, and the new law thus introduced, so far as it does not conflict with the natural law, ought to be considered as the common law of all nations. This law we have deemed proper to term, with Grotius, though in a somewhat stricter sense, the voluntary Law of Nations.'(a)

Wolf afterwards says, that 'the voluntary law of nations derives its force from the presumed consent of nations, the conventional from their express consent; and the consuetudinary from their tacit consent.'(b)

This presumed consent of nations (*consentium gentium præsumptum*) to the voluntary law of nations he derives from the fiction of a great commonwealth of nations (*civitate gentium maxima*) instituted by nature herself, and of which all the nations of the world are members. As each separate society of men is governed by its peculiar laws freely adopted by itself, so is the general society of nations governed

(d) Ibid. cap. xix. § 6.

(a) Wolfius, Jus Gentium, Pref. § 3.

(b) Wolfius, Proleg. § 25.

by its appropriate laws freely adopted by the several members, on their entering the same. These laws he deduces from a modification of the natural law, so as to adapt it to the peculiar nature of that social union, which, according to him, makes it the duty of all nations to submit to the rules by which that union is governed, in the same manner as individuals are bound to submit to the laws of the particular community of which they are members. But he takes no pains to prove the existence of any such social union or universal republic of nations, or to show when and how all the human race became members of this union or citizens of this republic.

§ 8. Wolf differs from Grotius, as to the origin of the voluntary law of nations, in two particulars:

1. Grotius considers it as a law of positive institution, and rests its obligation upon the general consent of nations, as evidenced in their practice. Wolf, on the other hand, considers it as a law which nature has [13] imposed upon all mankind as a necessary consequence of their social union; and to which no one nation is at liberty to refuse its assent.

Differences of opinion between Grotius and Wolf on the origin of the voluntary Law of Nations.

2. Grotius confounds the voluntary law of nations with the customary law of nations. Wolf maintains that it differs in this respect, that the voluntary law of nations is of universal obligation, whilst the customary law of nations merely prevails between particular nations, among whom it has been established from long usage and tacit consent.

§ 9. It is from the work of Wolf that Vattel has drawn the materials of his treatise on the law of nations. He, however, differs from that publicist in the manner of establishing the foundations of the voluntary law of nations. Wolf deduces the obligations of this law, as we have already seen, from the fiction of a great republic instituted by nature herself, and of which all the nations of the world are members. According to him the voluntary law of nations is, as it were, the civil law of that great republic. This idea does not satisfy Vattel. 'I do not find,' says he, 'the fiction of such a republic either very just or sufficiently solid, to deduce from it the rules of a universal law of nations, necessarily admitted among sovereign States. I do not recognize any other natural society between nations than that which nature has established between all men. It is the essence of all civil society, (*civitatis*,) that each member thereof should have given up a part of his rights to the body of the society, and that there should exist a supreme authority capable of commanding all the members, of giving to them laws, and of punishing those who refuse to obey. Nothing like this can be conceived or supposed to exist between nations. Each sovereign State pretends to be, and in fact is, independent of all others. Even according to Mr. Wolf, they must all be considered as so many free

Systems of Vattel and Wolf.

individuals, who live together in a state of nature, and acknowledge no other law than that of nature itself, and its Divine Author.'(a)

According to Vattel, the Law of Nations, in its origin, is nothing but *the law of nature applied to nations*.

Having laid down this axiom, he qualifies it in the same manner, and almost in the identical terms of Wolf, by stating that the nature of the subject to which it is applied being different, [14] the law which regulates the conduct of individuals must necessarily be modified in its application to the collective societies of men called nations or states. A State is a very different subject from a human individual, from whence it results that the obligations and rights, in the two cases, are very different. The same general rule, applied to two subjects, cannot produce the same decisions, when the subjects themselves differ. There are, consequently, many cases in which the natural law does not furnish the same rule of decision between State and State as would be applicable between individual and individual. It is the art of accommodating this application to the different nature of the subjects in a just manner, according to right reason, which constitutes the law of nations a particular science.

This application of the natural law, to regulate the conduct of nations in their intercourse with each other, constitutes what both Wolf and Vattel term the *necessary law of nations*. It is *necessary*, because nations are absolutely bound to observe it. The precepts of the natural law are equally binding upon States as upon individuals, since States are composed of men, and since the natural law binds all men, in whatever relation they may stand to each other. This is the law which Grotius and his followers call the *internal law of nations*, as it is obligatory upon nations in point of conscience. Others term it the *natural law of nations*. This law is immutable, as it consists in the application to States of the natural law, which is itself immutable because founded on the nature of things, and especially on the nature of man.

This law being immutable, and the law which it imposes necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.(b)

Vattel has himself anticipated one objection to his doctrine that States cannot change the necessary law of nations by their conventions with each other. This objection is, that it would be inconsistent with the liberty and independence of a nation to allow to others the right of determining whether its conduct was or was not conformable to the necessary law of nations. He obviates the objection by a distinction

(a) Vattel, *Droit des Gens*, Préface.

(b) *Droit des Gens*, Préliminaires, §§ vi, vii, viii, ix.

which pronounces treaties made in contravention of the necessary law of nations to be invalid, according to the *internal* law, or that of conscience, [15] at the same time that they may be valid by the *external* law; States being often obliged to acquiesce in such deviations from the former law in cases where they do not affect their perfect rights.(c)

From this distinction of Vattel, flows what Wolf had denominated the voluntary law of nations, (*jus gentium voluntarium*.) to which term his disciple assents, although he differs from Wolf as to the manner of establishing its obligation. He however agrees with Wolf in considering the voluntary law of nations as a positive law, derived from the presumed or tacit consent of nations to consider each other as perfectly free, independent, and equal, each being the judge of its own actions, and responsible to no superior but the Supreme Ruler of the universe.

Besides this voluntary law of nations, these writers enumerate two other species of international law. These are:

1. The conventional law of nations, resulting from compacts between particular States. As a treaty binds only the contracting parties, it is evident that the conventional law of nations is not a universal, but a particular law.

2. The customary law of nations, resulting from usage between particular nations. This law is not universal, but binding upon those States only which have given their tacit consent to it.

Vattel concludes that these three species of international law, the *voluntary*, the *conventional*, and the *customary*, compose together the *positive law of nations*. They proceed from the will of nations; or (in the words of Wolf) 'the *voluntary*, from their presumed consent; the *conventional*, from their express consent; and the *customary*, from their tacit consent.'(d)

It is almost superfluous to point out the confusion in this enumeration of the different species of international law, which might easily have been avoided by reserving the expression, 'voluntary law of nations,' to designate the *genus*, including all the rules introduced by positive consent, for the regulation of international conduct, and divided into the two *species* of conventional law and customary law, the former being introduced by treaty, and the latter by usage; the former by express consent, and the latter by tacit consent between nations.(e)

[16] § 10. According to *Heffter*, one of the most recent and distinguished public jurists of Germany, 'the law of nations, *jus gentium*, in its most ancient and most extensive acceptation, as established by the Roman jurisprudence, is a law (*Recht*) founded upon the general

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Heffter.

(c) Droit des Gens, Préliminaires, § ix.

(d) Droit des Gens, Préliminaires, § xxvii.; Wolfius, Proleg. xxv.

(e) Vattel, Droit des Gens, edit. de Pinheiro Ferreira, tom. iii. p. 22.

usage and tacit consent of nations. This law is applied, not merely to regulate the mutual relations of States, but also of individuals, so far as concerns their respective rights and duties, having everywhere the same character and the same effect, and the origin and peculiar form of which are not derived from the positive institutions of any particular State.' According to this writer, the *jus gentium* consists of two distinct branches:

1. Human rights in general, and those private relations which sovereign States recognize in respect to individuals not subject to their authority.

2. The direct relations existing between those States themselves. 'In the modern world, this latter branch has exclusively received the denomination of law of nations, *Völkerrecht*, *Droit des Gens*, *Jus Gentium*. It may more properly be called external public law, to distinguish it from the internal public law of a particular State. The first part of the ancient *jus gentium* has become confounded with the municipal law of each particular nation, without at the same time losing its original and essential character. This part of the science concerns, exclusively, certain rights of men in general, and those private relations which are considered as being under the protection of nations. It has been usually treated of under the denomination of *private international law*.'

Heffter does not admit the term international law (*droit international*) lately introduced and generally adopted by the most recent writers. According to him this term does not sufficiently express the idea of the *jus gentium* of the Roman juriconsults. He considers the law of nations as a law common to all mankind, and which no people can refuse to acknowledge, and the protection of which may be claimed by all men and by all States. He places the foundation of this law on the incontestable principle that wherever there is a society, there must be a law obligatory on all its members; and he thence deduces the consequence that there must likewise be for the great society of nations an analogous law.⁶

[17] 'Law in general (*Recht im Allgemeinen*) is the external freedom of the moral person. This law may be sanctioned and guaranteed by a superior authority, or it may derive its force from self-protection. The *jus gentium* is of the latter description. A nation associating itself with the general society of nations, thereby recognizes a law common to all nations by which its international relations are to be regulated. It cannot violate this law, without exposing itself to the danger of in-

[⁶ The French translator of Heffter, M. Bergson, has entitled his work 'Le Droit International Public de l'Europe;' and Heffter has said that he did not intend the construction put upon his language by the author. He considers International Law as a proper term to express that portion of the ancient idea of *jus gentium* which related to the intercourse and obligations of independent States with each other.]-D.

curring the enmity of other nations, and without exposing to hazard its own existence. The motive which induces each particular nation to observe this law depends upon its persuasion that other nations will observe towards it the same law. The *jus gentium* is founded upon reciprocity of will. It has neither lawgiver nor supreme judge, since independent States acknowledge no superior human authority. Its organ and regulator is public opinion: its supreme tribunal is history, which forms at once the rampart of justice and the Nemesis by whom injustice is avenged. Its sanction, or the obligation of all men to respect it, results from the moral order of the universe, which will not suffer nations and individuals to be isolated from each other, but constantly tends to unite the whole family of mankind in one great harmonious society.'^(a)

§ 11. Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian [18] people of Europe or to those of European origin. This distinction between the European law of nations and that of the other races of mankind has long been remarked by the publicists. *Grotius* states that the *jus gentium* acquires its obligatory force from the positive consent of all nations, or *at least of several*. 'I say of several, for except the natural law, which is also called the *jus gentium*, there is no other law which is common to all nations. It often happens, too, that what is the law of nations in one part of the world is not so in another, as we shall show in the proper place.'^(a) So also *Bynkershoek*, in the passage before cited, says that 'the law of nations is that which is

There is no universal law of nations.

(a) Heffter, *Das europäische Völkerrecht*, § 2.

The learned Jesuit Saurez⁽¹⁾ has anticipated this view of the moral obligation of the *jus gentium*. 'Ratio hujus juris est, quia humanum genus, quamvis in⁽¹¹⁾ varios populos et regna divisum, semper habeat aliquam unitatem, non solum specificam, sed etiam quasi politicam et moralem, quam indicat naturale præceptum mutui amoris et misericordiæ, quod ad omnes extenditur, etiam extraneos et cujuscunque nationis. Quapropter, licet unaquaque⁽¹¹¹⁾ civitas perfecta, respublica, aut regnum, sit in se communitas perfecta et suis membris constans, nihilominus quælibet illarum etiam^(1v) membrum aliquo modo hujus universi prout genus^(v) humanum spectat. Nunquam enim illæ communitates adeo sunt sibi sufficientes singillatim, quin indigeant aliquo mutuo juvamine, et societate, ac communicatione, interdum ad melius esse majoremque utilitatem, interdum vero et^(vi) ob moralem necessitatem. Hæc^(vii) ergo ratione indigent aliquo jure, quo dirigantur et recte ordinentur in hoc genere communicationis et societatis. Et quamvis magnâ ex parte hoc fiat per rationem naturalem, non tamen sufficienter et immediatè quoad omnia: ideoque potuerunt usu^(viii) earundem gentium introduci.' Saurez,⁽¹⁾ de Legibus et Deo Legislatore, lib. ii. cap. xix. n. g.

(a) De Jur. Bel. ac Pac. lib. i. cap. i, § xiv. 4.^(1x)

[¹ For Saurez read Suárez.]—G.G.W.

[¹¹ For Ratio hujus juris est, quia humanum genus, quamvis in read Ratio autem hujus partis et juris est, quia humanum genus quantumvis in.]—G.G.W.

[¹¹¹ For unaquaque read unaquaque.]—G.G.W.

[^{1v} For etiam read est et.]—G.G.W.

[^v For prout genus read prout ad genus.]—G.G.W.

[^{vi} For et read etiam.]—G.G.W.

[^{vii} For necessitatem. Hæc read necessitatem et indigentiam, ut ex ipso usu constat. Hac.]—G.G.W.

[^{viii} For ideoque potuerunt usu read ideoque aliqua specialia jura potuerunt.]—G.G.W.

[^{1x} For 4 read 1.]—G.G.W.

observed, in accordance with the light of reason, between nations, if not among all, *at least certainly among the greater part, and those the most civilized.*'(b) *Leibnitz* speaks of the voluntary law as established by the tacit consent of nations. 'Not,' says he, 'that it is necessarily the law of all nations and of all times, since the Europeans and the Indians frequently differ from each other concerning the ideas which they have formed of international law, and even among us it may be changed by the lapse of time, of which there are numerous examples. The basis of international law is natural law, which has been modified according to times and local circumstances.'(c) *Montesquieu*, in his *Esprit des Lois*, says, that 'every nation has a law of nations—even the Iroquois, who eat their prisoners, have one. They send and receive ambassadors; they know the laws of war and peace; the evil is, that their law of nations is not founded upon true principles.'(d)

There is then, according to these writers, no universal law of nations, such as *Cicero* describes in his treatise *De Republica*, binding upon the whole human race—which all mankind in all ages and countries, ancient and modern, savage and civilized, Christian and Pagan, have recognized in theory or in practice, have professed to obey,

Jus and Lex, or have in fact obeyed.

§ 12. An eminent French writer on the science of which we propose to treat, has questioned the propriety of using the term *droit des gens* (law of nations) as applicable to those rules of conduct which obtain between independent societies [19] of men. He asserts that 'there can be no *droit* (right) where there is no *loi* (law); and there is no law where there is no superior: without law, obligations, properly so called, cannot exist; there is only a moral obligation resulting from natural reason; such is the case between nation and nation. The word *gens* imitated from the Latin, does not signify in the French language either people or nations.'(a)

The same writer has made it the subject of serious reproach to the English language that it applies the term *law* to that system of rules which governs, or ought to govern, the conduct of nations in their mutual intercourse. His argument is, that law is a rule of conduct, deriving its obligation from sovereign authority, and binding only on those persons who are subject to that authority;—that nations, being independent of each other, acknowledge no common sovereign from whom they can receive the law;—that all the relative duties between nations result from *right* and *wrong*, from convention and usage, to neither of which can the term *law* be properly applied;—that this system of rules had been called by the Roman lawyers the *jus gentium*,

(b) Bynkershoek, *De Foro Legatorum*. Vid. *supra*.

(c) *Leibnitz*, *Cod. Jur. Gent. diplom.* Préf.

(d) *Esprit des Lois*, liv. i. ch. 3.

(a) *Rayneval*, *Institutions du Droit de la Nature et des Gens*, Note 10 du 1er liv. p. viii.

and in all the languages of modern Europe, except the English language, the *right of nations*, or the laws of war and peace.^(b)

That very distinguished legal reformer, Jeremy Bentham, had previously expressed the same doubt how far the rules of conduct which obtain between nations can with strict propriety be called *laws*.^(c) And one of his disciples has justly observed, that '*laws*, properly so called, are commands proceeding from a determinate rational being, or a determinate body of rational beings, to which is annexed an eventual evil as the sanction. Such is the law of nature, more properly called the law of God, or the divine law; and such are political human laws, prescribed by political superiors to persons in a state of subjection to their authority. But laws imposed by general opinion are styled *laws* by an analogical extension of the term. Such are the laws of honor imposed by opinions current in the fashionable world, and enforced by appropriate sanction. Such, also, are the laws which [20] regulate the conduct of independent political societies in their mutual relations, and which are called the law of nations, or international law. This law obtaining between nations is not positive law; for every positive law is prescribed by a given superior or sovereign to a person or persons in a state of subjection to its author. The rule concerning the conduct of sovereign States, considered as related to each other, is termed *law* by its analogy to positive law, being imposed upon nations or sovereigns, not by the positive command of a superior authority, but by opinions generally current among nations. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they should violate maxims generally received and respected.'

^(d)⁽¹⁾

This law has commonly been called the *jus gentium* in the Latin, *droit des gens* in the French, and law of nations in the English language. It was more accurately termed the *jus inter gentes*, the law between or among nations, for the first time, by Dr. Zouch, an English civilian and writer on the science, distinguished in the celebrated controversy between the civil and common lawyers during the reign of Charles II., as to the extent of the Admiralty jurisdiction. He introduced this term as more appropriate to express the real scope and object of this law.^(e) An equivalent term in the French language was subsequently proposed by Chancellor D'Aguesseau, as better adapted to express the

(b) *Droit des gens*, *Fr.* Diritto delle genti, *Ital.* Derecho de gentes, *Span.* Direito das Gentes, *Portug.* Völkerrecht, *Germ.* Volkenrecht, *Dutch.* Folkeret, *Dan.* Folkrätt, *Swed.*

(c) Bentham, *Morals and Legislation*, ii. 256. Ed. 1823.

(d) Austin, *Province of Jurisprudence determined*, 147, 207.

(e) Zouch, *Juris et Judicii Feialis, sive Juris inter Gentes*. Lond. 1650.

[¹ The quotation '*laws*, properly so called' &c., is a summary made from Austin, *Province of Jurisprudence*, 146-8, 207-8.]—G.G.W.

idea properly annexed to that system of jurisprudence commonly called *le droit des gens*, but which, according to him, ought properly to be termed *le droit entre les gens*.^(f) The term *international law* has been since proposed by Mr. Bentham as well adapted to express in our language, 'in a more significant manner that branch of jurisprudence, which commonly goes under the name of *law of nations*, a denomination so uncharacteristic, that were it not for the force of custom, it would rather seem to refer to internal or municipal jurisprudence.'^(g)⁽¹⁾ The terms *international law* and *droit international* have now taken root in the English and French languages, and are constantly used in all [21] discussions connected with the science, and we cannot agree with Heffter in proscribing them.⁷

Opinion of
Savigny.

§ 13. According to Savigny, 'there may exist between different nations the same community of ideas which contributes to form the positive unwritten law (*das positive Recht*) of a particular nation. This community of ideas, founded upon a common origin and religious faith, constitutes international law as we see it existing among the Christian States of Europe, a law which was not unknown to the people of antiquity, and which we find among the Romans under the name

(f) Œuvres de D'Aguesseau, tom. ii. p. 337. Ed. 1773.

(g) Bentham, *Morals and Legislation*, ii. 256.

[⁷ *Jus* and *Lex*.—This seems to be merely a question of nomenclature. The object is to find the most suitable term by which to designate those rules of conduct which govern nations in their intercourse with each other. There seems to be no reason in the nature of things why the term *jus gentium*, and the corresponding words in modern languages, *droit des gens* (or, *des nations*), and *law of nations*, should not be satisfactory. The objection is only that the Romans did in fact use the term *jus gentium* in a wider sense, so as to include more than we seek to express. But that objection has never attached itself to the corresponding words in the languages of modern Europe. Still, to obviate the objection that such wider and more undefined sense might be transferred from one to the other, the new terms, *International law*, *Jus inter gentes*, *Droit International*, *Derecho Internacional*, &c., have been invented, and apparently for no other reason. As technical terms, they will probably be continued; but, in ordinary discourse, the older terms, *Law of Nations*, *Droit des gens*, &c., are more commonly used, and with a signification not misunderstood, or liable to doubt. The infirmity of the English language in having but one word, 'law', by which to express the two ideas the Romans expressed by *jus* and *lex*, and the French express by *droit* and *loi*, the Germans by *Recht* and *Gesetz*, and for which all other modern nations seem to have two words, appears to be beyond remedy. None has even been proposed. But, in practice, the word 'law' is understood by its context, as is the case with a great number of words: and no one, speaking of a law of nations, or an international law, would understand the word in the sense of *lex* or *loi*, as distinguished from *jus* and *droit*; for all who use the English language are obliged to make a corresponding distinction, *secundum subjectam materiam*, wherever the word 'law' is employed, in matters human or divine. See Manning on Intern. Law, 2; ⁽¹¹⁾ Heron's Hist. of Jurisprudence, 146; Felix, ⁽¹¹⁾ Droit Intern. Privé, ch. i. § 1, note 1; Hautefeuille, Droits des Nations Neutres, ^(1v) i. 3. The Spanish writers, Riquelme and Bello use the term *Derecho Internacional*. Kent's Comm. i. 2, note a; Westlake's Pr. Intern. Law, 1; Phillimore's ^(v) Intern. Law, i. 2; Woolsey's Introd., § 9.]—D.

[¹ The exact quotation from Bentham reads: in a more significant way, the branch of law which goes commonly under the name of *law of nations*: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence.]—G.G.W.

[⁽¹¹⁾ For Manning on Intern. Law, 2 read Manning, Commentaries on the Law of Nations, 2.]—G.G.W.

[^(1v) For Droits des Nations Neutres read Des droits et des devoirs des nations neutres.]—G.G.W.

[^(v) For Phillimore's read Phillimore's.]—G.G.W.

of *jus feciale*. International law may therefore be considered as a positive law, but as an imperfect positive law, (*eine unvollendete Rechtsbildung*), both on account of the indeterminateness of its precepts, and because it lacks that solid basis on which rests the positive law of every particular nation, the political power of the State and a judicial authority competent to enforce the law. The progress of civilization, founded on Christianity, has gradually conducted us to observe a law anal[22]ogous to this in our intercourse with all the nations of the globe, whatever may be their religious faith, and without reciprocity on their part.^(a)

It may be remarked, in confirmation of this view, that the more recent intercourse between the Christian nations in Europe and America and the Mohammedan and Pagan nations of Asia and Africa indicates a disposition, on the part of the latter, to renounce their peculiar international usages and adopt those of Christendom. The rights of legation have been recognized by, and reciprocally extended to, Turkey, Persia, Egypt, and the States of Barbary. The independence and integrity of the Ottoman Empire have been long regarded as forming essential elements in the European balance of power, and, as such, have recently become the objects of conventional stipulations between the Christian States of Europe and that Empire, which may be considered as bringing it within the pale of the public law of the former.^(b)

The same remark may be applied to the recent diplomatic transactions between the Chinese Empire and the Christian nations of Europe and America, in which the former has been compelled to abandon its inveterate anti-commercial and anti-social principles, and to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace.⁸

(a) Savigny, *System des heutigen römischen Rechts*, 1. Band, 1. Buch, Kap. ii, § 11.

(b) Wheaton's *Hist. Law of Nations*, 583.

[⁸ By the Treaty of Paris, of March 30, 1856, the great powers invited the Sultan to participate in the advantages of the public law and system of Europe. There are treaties of the Sultan with Austria, Venice, and Poland, in 1699; with Austria in 1718 (the Peace of Passarowitz); and with Russia in 1774, 1792, 1812, 1826, 1829, and 1833. The United States and the maritime nations of Europe have treaties with China and Japan, and ministers resident at Peking and Yedo. The United States have treaties with China, of 1844 and 1858; and with Japan, of 1854 and 1858; with the Ottoman Empire, of 1830 and 1862; with Siam, of 1833 and 1858; with Algiers, of 1795, 1815, and 1816; Tripoli, of 1796 and 1805; Tunis, of 1799 and 1824; Persia, of 1856; the Sultan of Muscat, of 1833; Morocco, of 1836; and Borneo, of 1850.

The most remarkable proof of the advance of Western civilization in the East, is the adoption of this work of Mr. Wheaton, by the Chinese Government, as a text-book for its officials, in International Law, and its translation into that language, in 1864, under imperial auspices. The translation was made by the Rev. W. A. P. Martin, D.D., an American missionary, assisted by a commission of Chinese scholars appointed by Prince Kung, Minister of Foreign Affairs, at the suggestion of Mr. Burlingame, the United States Minister, to whom the translation is dedicated. Already this work has been quoted and relied upon by the Chinese Government, in its diplomatic correspondence with ministers of Western Powers resident at Peking.]—D.

Definition
of interna-
tional law.

[23] § 14. International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.⁽¹⁾(a)⁹

Sources of
international
law.

§ 15. The various sources of international law in these different branches are the following:—

1. Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.

Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony [24] increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles.

2. Treaties of peace, alliance, and commerce declaring, modifying, or defining the pre-existing international law.

(a) Madison, *Examination of the British Doctrine which subjects to Capture a Neutral Trade not open in Time of Peace*, 41. London ed. 1806.

[⁹ Halleck defines the Law of Nations to be 'the rules of conduct regulating the intercourse of States.' Halleck's *Intern. Law*, 42.

Woolsey defines it as 'the aggregate of the rules which Christian States acknowledge as obligatory in their relations to each other and to each other's subjects.' Woolsey's *Intro.* § 5.

Professor Cairns says: 'International law is the formal expression of the public opinion of the civilized world respecting the rules of conduct which ought to govern the relations of independent nations, and is, consequently, derived from the source from which all public opinion flows,—the moral and intellectual convictions of mankind.'

Kent describes it as 'that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other,' and as existing 'according to the general usages of nations.'⁽¹¹⁾ Kent's *Comm.* i. 1.

'Self-protection and intercourse are the two sources of international law. They make it necessary; and the conception in man of justice, of rights and obligations, must follow, because he has a moral nature.' Woolsey's *Intro.* § 6, note.

Austin points out the fault of the older Continental writers in confounding rules of international morality, as, in their opinion, they should be, with the actual international law in operation among nations. *Province of Jurisprudence*, 235,⁽¹¹¹⁾ note. Hautefeuille divides international law into two parts, which he calls *primitif* and *secondaire*,—the first containing, as he says, the principles, the absolute basis, of the law; and the second, the measures or provisions for calling up these principles and securing their execution. *Droits des Nations Neutres*⁽¹¹²⁾ i. 6-13. In the application of this theory, it will be found that the distinguished writer usually treats the primitive law, or the well or fountain of first principles, as of actual authority, where no express agreement departs from it; and so much of the practice of nations as consists in judicial decisions adopted, enforced, and acquiesced in, he considers as of less authority than the primitive law as it lies in the breast of the text-writers.]—D.

[¹ Madison, *loc. cit.*, reads: 'of those rules of conduct which reason deduces, as consonant to justice and common good, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent.']—G.G.W.

[¹¹ *Omit* quotation marks. Kent is paraphrasing the Ordinance of Dec. 4, 1781, which reads: 'according to the general usages of Europe.']—G.G.W.

[¹¹¹ For 235 read 276.]—G.G.W.

[¹¹² For *Droits des Nations Neutres* read *Des droits et des devoirs des nations neutres*.]—G.G.W.

What has been called the positive or practical law of nations may also be inferred from treaties; for though one or two treaties, varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of treaties, establishing a particular rule, will go very far towards proving what that law is on a disputed point. Some of the most important modifications and improvements in the modern law of nations have thus originated in treaties.^(a)

'Treaties,' says Mr. Madison, 'may be considered under several relations to the law of nations, according to the several questions to be decided by them.'

'They may be considered as simply repeating or affirming the general law; they may be considered as making exceptions to the general law, which are to be a particular law between the parties themselves; they may be considered explanatory⁽ⁱ⁾ of the law of nations on points where its meaning is otherwise obscure or unsettled, in which they⁽ⁱⁱ⁾ are, first, a law between the parties themselves, and next, a sanction to the general law, according to the reasonableness of the explanation, and the number and character of the parties to it; lastly, treaties may be considered a⁽ⁱⁱⁱ⁾ voluntary or positive law of nations.'^(b)

3. Ordinances of particular States, prescribing rules for the conduct of their commissioned cruisers and prize tribunals.

The marine ordinances of a State may be regarded, not only as historical evidences of its practice with regard to the rights of maritime war, but also as showing the views of its jurists with respect to the rules generally recognized as conformable to the universal law of nations. The usage of nations, which constitutes the law of nations, has not yet established an impartial tribunal for determining the validity of maritime captures. Each belligerent State refers the jurisdiction over such cases to the courts of admiralty established under its own authority within [25] its own territory, with a final resort to a supreme appellate tribunal, under the direct control of the executive government. The rule by which the prize courts thus constituted are bound to proceed in adjudicating such cases, is not the municipal law of their own country, but the general law of nations, and the particular treaties by which their own country is bound to other States. They may be left to gather the general law of nations from its ordinary sources in the authority of institutional writers; or they may be furnished with a positive rule by their own sovereign, in the form of ordinances, framed

(a) Bynkershoek, *Quest. Jur. Pub. lib. i. cap. 10.*

(b) Madison, *Examination of the British Doctrine, &c., 39.*

[ⁱ For considered explanatory *read* considered as explanatory.]—G.G.W.

[ⁱⁱ For in which they *read* in which case they.]—G.G.W.

[ⁱⁱⁱ For considered a *read* considered as constituting a.]—G.G.W.

according to what their compilers understood to be the just principles of international law.¹⁰

The theory of these ordinances is well explained by an eminent English civilian of our own times. 'When,' says Sir William Grant, 'Louis XIV. published his famous ordinance of 1681, nobody thought that he was undertaking to legislate for Europe, merely because he collected together and reduced into the shape of an ordinance the principles of marine law as then understood and received in France. I say as understood in France, for although the law of nations ought to be the same in every country, yet as the tribunals which administer the law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted it was not, at the period now referred to, supposed that one State could make or alter the law of nations, but it was judged convenient [26] to establish certain principles of decision, partly for the purpose of giving a uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was. The French courts have well and properly understood the effect of the ordinances of Louis XIV. They have not taken them as positive rules binding upon neutrals; but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, which it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation.'^(c)⁽ⁱ⁾

4. The adjudications of international tribunals, such as boards of arbitration and courts of prize.

[¹⁰ In the United States, the prize jurisdiction is not given to commissions appointed by the executive government, but to the regular and standing courts of the republic, whose judges have a permanent and independent tenure, being appointed by the President, confirmed by the Senate, and holding for life, subject to be removed only upon conviction after impeachment. In matters of prize law, the rules laid down by their own government on the subject, whether as interpretations of the rules of war, or as deviations from them, are binding upon the courts. In the absence of such, they must presume their government intends to act in conformity with the practice of nations. A rule of war, adopted by the proper constitutional authority, must be accepted by the court as the actual rule for the nation in that war, adopted on its international responsibility. These are familiar principles; and except as they give it color, it cannot be said that the prize courts of the United States 'are under the direct control of the executive government.' All that can be said is, that, whatever under our Constitution, in its division of functions between legislative, judicial, and executive departments, is a competent legislative or executive function in respect to the acts or rules of war, is binding on the prize courts.]—D.

(c) Marshall on Insurance, i. 425. The commentary of Valin upon the marine ordinance of Louis XIV., published in 1760, contains a most valuable body of maritime law, from which the English writers and judges, especially Lord Mansfield, have borrowed very freely, and which is often cited by Sir W. Scott (Lord Stowell) in his judgments in the High Court of Admiralty. Valin also published, in 1763, a separate *Traité des Prises*, which contains a complete collection of the French prize ordinances down to that period.

This is not an exact quotation.]—G.G.W.

As between these two sources of international law, greater weight is justly attributable to the judgments of mixed tribunals, appointed by the joint consent of the two nations between whom they are to decide, than to those of admiralty courts established by and dependent on the instructions of one nation only.

5. Another depository of international law is to be found in the written opinions of official jurists, given confidentially to their own governments. Only a small portion of the controversies which arise between States becomes public. Before one State requires redress from another, for injuries sustained by itself, or its subjects, it generally acts as an individual would do in a similar situation. It consults its legal advisers, and is guided by their opinion as to the law of the case. Where that opinion has been adverse to the sovereign client, and has been acted on, and the State which submitted to be bound by it was more powerful than its opponent in the dispute, we may confidently assume that the law of nations, such as it was then supposed to be, has been correctly laid down. The archives of the department of foreign affairs of every country contain a collection of such documents, the publication of which would form a valuable addition to the existing materials of international law.(d)

[27] 6. The history of the wars, negotiations, treaties of peace, and other transactions relating to the public intercourse of nations, may conclude this enumeration of the sources of international law.¹¹

(d) Senior, *Edinburgh Review*, No. 156, art. 1, p. 211.

The written opinions delivered by Sir Leoline Jenkins, Judge of the High Court of Admiralty in the reign of Charles II., in answer to questions submitted to him by the King or by the Privy Council, relating to prize causes, were published as an Appendix to Wynne's *Life of that eminent civilian*. (2 vols. fol. London, 1724.) They form a rich collection of precedents in the maritime law of nations, the value of which is enhanced by the circumstance that the greater part of these opinions were given when England was neutral, and was consequently interested in maintaining the right of neutral commerce and navigation. The decisions they contain are dictated by a spirit of impartiality and equity, which does the more honor to their author as they were addressed to a monarch who gave but little encouragement to those virtues, and as Jenkins himself was too much of a courtier to practise them, except in his judicial capacity. Madison, *Examination of the British Doctrine, &c.*, 113. Lond. edit. 1806.

[¹¹ *Sources of International Law*.—Commentators seem agreed as to what are the sources of international law. They differ as to the relative importance and authority of these sources. Hautefeuille, especially, gives little weight to the decisions of prize courts, and places far before them the speculations of writers. It is noticeable that continental writers incline the same way, although they may not go as far; while Wheaton, Kent, Story, Halleck, and Woolsey in America, and Phillimore, Manning, Wildman, Twiss, and others in England, give a higher place to judicial decisions. This is attributable to the different systems of municipal law under which they are educated. In England and America, judicial decisions are authoritative declarations of the common law, *i.e.* the law not enacted by decrees of legislators, but drawn from the usages and practices of the people, and from reason and policy. They are, at the same time, the highest evidence of what the law is. Under those systems, writers are brought to the test of judicial decisions; and even those portions of the opinions of the court itself, not necessary to the decision of the cause before it, are termed *obiter dicta*, and are not authority, but stand on no higher ground than voluntary speculations of learned men as to what the law might prove to be in a supposed case. The continental writers, on the other hand,—living under

municipal systems in which judicial decisions hold no such place, and are neither precedents, authoritative declarations, nor authentic evidence of the law,—are led by their education to look to but one authoritative source of law, the decrees of legislators; and, in the absence of these, naturally put the scientific treatises of learned men, systematic, and enriched with illustrations, above the special decisions of tribunals on single cases, which, by their systems, do no more than settle the particular controversy, without settling the principles evoked for its decision. With the English and American lawyer or scholar, it is the habit of life to consider a decision by a judicial tribunal, on an actual case, as ordinarily the best attainable evidence of what the law applicable to that case is. The fact that parties have been engaged in actual conflict, in which property, character, or life, have been staked upon the law of that case, and learned counsel employed, creates a probability that the law has been thoroughly examined, and shown in the various lights in which open contestation tends to place it. It is thought, too, that the law evoked by actual cases, after they have arisen and been presented, with all their consequences, is more likely to be practical, than the mere abstract speculations of the wisest. The court, too, in ascertaining the law and applying it, beside having the aids referred to, is acting under the sanctions of public official duty on a matter known to involve interests, which the law it shall declare will settle finally; and with the [28] further caution of knowing that the principle or rule it adopts is to become a general precedent for the law of other cases, and to be subjected afterwards to the test of time, not only by critical examinations of text-writers, but in respect of its applicability to the actual transactions of life, brought before the same or other courts, under other circumstances and in other times.

This discussion does not require an award of general superiority between the publicist and the judge. In the United States, Story and Kent were distinguished alike in each capacity; and, while they saw the value of their own connected systematic treatises, and might attribute their personal fame chiefly to them, yet, on a simple and direct question of a particular point of law, either of them would have preferred, *ceteris paribus*, to stand by a decision he had made on an actual case argued and tried before him, than on what he might have said in a treatise upon a point which had not been the subject of his judicial decision.

But, on the subject of judicial decisions on international questions, there is another view even higher than this. So far as international law rests on the practice of nations, judicial decisions in prize causes are parts of the law itself. The condemnation or release of a prize, the granting or withholding of the claim of a neutral, is a sovereign act, on sovereign responsibility. The State to which the individual belongs whose claim is rejected by the belligerent State, is not bound by the decision, but may hold the belligerent State responsible. The custom of nations requires the belligerent sovereign to submit the question to his own court, before he shall reject the claim of the neutral; but he may allow the claim, without submitting it to a prize court, or even after the prize court shall have decided against it. If the decision is thus adverse, and the sovereign determines to adopt it, it becomes an act of the nation, upon national responsibility. The decision, therefore, of a prize court, adopted and carried out by the sovereign, has double authority. It is all that a solemn judicial decision by a magistrate can be, upon an actual case, investigated and argued by deeply interested parties, and known by the judge to involve vast consequences not only to the parties, but possibly of peace or war for nations. It is also a national act, on national responsibilities. If a prize court decides against its own sovereign, and his immediate interests, and he restores or makes indemnity, this is surely better proof of what is the law on that point, than the opinion of a writer treating of abstract questions. But it is also an inherent part of international law itself; for it is one of those national acts that constitute that law. The same is true in kind, though not so striking in degree, of a decision made in favor of the sovereign, which he carries out with the acquiescence of the neutral sovereign whose subject is the loser. And even where the belligerent carries out the decision against the remonstrance of the neutral sovereign, and at the peril of war, or actually goes to war to maintain it, it is a national act,—the highest possible declaration by that nation of what, at the time, it intends to consider as the law of nations, then and afterwards.

Every decision of a prize tribunal is, or results in, a national act. The sovereign must either carry it out, or set it aside. The latter he will not be permitted to do, unless it be in his own favor. As a judicial decision, it is the most solemn and responsible opinion a learned doctor of the law can give; and, as a national act, it is done on the most solemn responsibility that can rest on a sovereign.

The consideration most favorable to the text-writer is his probable impartiality. Not that,

personally, he is more impartial than the magistrate, or has less of nationality, but that he is engaged on a scientific treatise, where his reputation must rest on the consistency and reasonableness of the whole, tested by time, and where he takes up subjects in the abstract, either past transactions, whose passions and interests [29] are passed or changed, or as speculations for the future, around which interests and passions are not formed. As an offset to this, it is to be remembered, that the commentator will often be a man of books and speculations, rather than of affairs; and that the judicial habit of determining actual controversies, in full view of both their nature and consequences, is most likely to evoke such rules of law as will be able to hold their place among the interests, policies, passions, and necessities of life.

Attempts to deduce international law from a theory that each individual is by nature independent, and has, by an implied contract, surrendered some of his natural rights and assumed some artificial obligations, for the purpose of establishing society for the common advantage; and that each State is, in like manner, independent, and has made like concessions for a like purpose of international advantages,—such attempts fall with the theories on which they rested. As no such state of things ever existed, and no such arrangements or compacts have ever been made, it is safer to draw principles of law from what is actual. Later writers, since philosophy has dropped the theory of the social compact, go upon the assumption that men and communities are by nature what they have always been found to be; that the rights and duties of each man are by Divine ordination, originally and necessarily, those at once of an individual and a member of society; and that the rights and duties of a State are, in like manner, those at once of an individual State and one among a number of States; and that neither class of these rights or duties is artificial, voluntary, or secondary.

In considering, therefore, whether a certain rule should or should not be adopted, the test is not its capacity to be carried through a circuitous and artificial course, beginning in a supposed natural independence of the human being, and ending in another supposed entity compounded of all civilized States; but various elements enter into the solution of international questions, and in various degrees, as fitness to conduce to the highest and most permanent interests of nations as a whole, of nations taken separately, differing as nations do in power and pursuits and interests, and of the human beings that compose those societies. If the question involves high ethics, it must be met in the faith that the highest justice is the best interest of all. If it be a question chiefly of national advantage, and of means to an admitted end, it must be met by corresponding methods of reasoning.]—D.

CHAPTER II

NATIONS AND SOVEREIGN STATES

§ 16. THE peculiar subjects of international law are Nations, and those political societies of men called States.

§ 17. *Cicero*, and, after him, the modern public jurists, define a State to be a body political, or society of men, [30] united together for the purpose of promoting their mutual safety and advantage by their combined strength.^(a)

Subjects of international law.

Definition of a State.

This definition cannot be admitted as entirely accurate and complete, unless it be understood with the following limitations:—

1. It must be considered as excluding corporations, public or

(a) 'Respublica est coetus multitudinis, juris consensu et utilitatis communione societas.'⁽¹⁾ Cic. de Rep. l. i. § 25.

'Potestas civilis est, qui⁽¹¹⁾ civitati præest. Est autem civitas coetus perfectus liberorum hominum, juris fruendi et communis utilitatis causâ sociatus.' Grotius, de Jur. Bel. ac Pac. lib. i. cap. i. § xiv. No. 2.⁽¹¹⁾ Vattel, Prélim. § 1, et liv. 1, chap. 1, § 1. Burlamaqui, Droit Naturel, tom. ii. part 1, ch. 4.

[¹ Quotation reads: Est . . . respublica . . . coetus multitudinis juris consensu et utilitatis communione sociatus.]—G.G.W.

[¹¹ For qui read quæ.]—G.G.W.

[¹¹ For No. 2 read No. 1.]—G.G.W.

private, created by the State itself, under whose authority they exist, whatever may be the purposes for which the individuals, composing such bodies politic, may be associated.

Thus the great association of British merchants incorporated, first, by the crown, and afterwards by Parliament, for the purpose of carrying on trade to the East Indies, could not be considered as a State, even whilst it exercised the sovereign powers of war and peace in that quarter of the globe, without the direct control of the crown, and still less can it be so considered since it has been subjected to that control. Those powers are exercised by the East India Company in subordination to the supreme power of the British empire, the external sovereignty of which is represented by the company towards the native princes and people, whilst the British government itself represents the company towards other foreign sovereigns and States.

2. Nor can the denomination of a State be properly applied to voluntary associations of robbers or pirates, the outlaws of other societies, although they may be united together for the purpose of promoting their own mutual safety and advantage.^(b)

3. A State is also distinguishable from an unsettled horde of wandering savages not yet formed into a civil society. The legal idea of a State necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested, and of a fixed abode, and definite territory belonging to the people by whom it is occupied.

4. A State is also distinguishable from a Nation, since the former may be composed of different races of men, all subject to [31] the same supreme authority. Thus the Austrian, Prussian, and Ottoman empires are each composed of a variety of nations and people. So, also, the same nation or people may be subject to several States, as is the case with the Poles, subject to the dominion of Austria, Prussia, and Russia, respectively.

Sovereign
princes the
subjects of
international
law.

§ 18. Sovereign princes may become the subjects of international law, in respect to their personal right, or rights of property, growing out of their personal relations with States foreign to those over whom they rule, or with the sovereigns or citizens of those foreign States. These relations give rise to that branch of the science which treats of the rights of sovereigns in this respect.¹²

Individuals,
or corpora-
tions, the
subjects of
international
law.

§ 19. Private individuals, or public and private corporations may, in like manner, incidentally, become the subjects of this law in regard

(b) . . . 'nec cœtus piratarum aut latronum civitas est, etiam si fortè æqualitatem quandam inter se servant, sine quâ nullus cœtus posset consistere.' Grotius, de Jur. Bel. ac Pac. lib. iii. cap. iii, § ii. No. 1.

[¹² On the conflicting rights and duties of a person who is a sovereign over one State, and a subject in another, see Heffter, § 52.]—D.

to rights growing out of their international relations with foreign sovereigns and states, or their subjects and citizens. These relations give rise to that branch of the science which treats of what has been termed private international law, and especially of the conflict between the municipal laws of different States.¹³

But the peculiar objects of international law are those direct relations which exist between nations and states. Wherever, indeed, the absolute or unlimited monarchical form of government prevails in any State, the person of the prince is necessarily identified with the State itself: *l'État c'est moi*. Hence the public jurists frequently use the terms sovereign and State as synonymous. So also the term sovereign is sometimes used in a metaphorical sense merely to denote a State, whatever may be the form of its government, whether monarchical, or republican, or mixed.

The terms sovereign and State used synonymously, or the former used metaphorically for the latter.

§ 20. Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally.

Sovereignty defined.

Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what [32] has been called internal public law, *droit public interne*, but which may more properly be termed constitutional law.

Internal sovereignty.

External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law, *droit public externe*, but may more properly be termed international law.

External sovereignty.

The recognition of any State by other States, and its admission into the general society of nations, may depend, or may be made to depend, at the will of those other States, upon its internal constitution or form of government, or the choice it may make of its rulers. But whatever be its internal constitution, or form of government, or whoever may be its rulers, or even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social tie, or by some other cause which puts an end to the being of the State.

[¹³ On this branch of Law, see Story's Conflict of Laws; Westlake's Private International Law; Burge's Commentaries; Fœlix's *Traité du Droit International Privé*; Savigny's *System des Römischen Rechts*, vol. viii. (translated into French by Guenoux, as *Traité de Droit Romain*); Walker's *Introd. to American Law*, edit. 2, 647, &c., and, for the general literature of this subject, see Mohl's *Geschichte und Literatur der Staatswissenschaften*, i. 441, &c.]—D.

Sovereignty,
how acquired.

§ 21. Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent.^(a)

This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed, in this respect, between these two species of sovereignty. The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty. The existence of the State *de facto* is sufficient, in this respect, to establish its sovereignty *de jure*. It is a State because it exists.

Thus the internal sovereignty of the United States of America was complete from the time they declared themselves 'free, sovereign, and independent States,' on the 4th of July, 1776. It [33] was upon this principle that the Supreme Court determined, in 1808, that the several States composing the Union, so far as regards their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign States, and that they did not derive them from concessions made by the British king. The treaty of peace of 1782 contained a recognition of their independence, not a grant of it. From hence it resulted, that the laws of the several State governments were, from the date of the declaration of independence, the laws of sovereign States, and as such were obligatory upon the people of such State from the time they were enacted. It was added, however, that the court did not mean to intimate the opinion, that even the law of any State of the Union, whose constitution of government had been recognized prior to the 4th of July, 1776, and which law had been enacted prior to that period, would not have been equally obligatory.^(b)¹⁴

The external sovereignty of any State, on the other hand, may require recognition by other States in order to render it perfect and complete. So long, indeed, as the new State confines its action to its own citizens, and to the limits of its own territory, it may well dispense with such recognition. But if it desires to enter into that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfil, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant, or refuse, this recognition, subject to the consequences of its own conduct in this respect ;

(a) Klüber, *Droit des Gens Moderne de l'Europe*, § 23.

(b) *Cranch's Rep.* iv. 212, *M'Ilvaine v. Cox's Lessee*.

¹⁴ *Harcourt v. Gaillard*, 12 *Wheat. Rep.* 527.]—D.

and until such recognition becomes universal on the part of the other States, the new State becomes entitled to the exercise of its external sovereignty as to those States only by whom that sovereignty has been recognized.

§ 22. The identity of a State consists in its having the same origin or commencement of existence; and its difference from all other States consists in its having a different origin or commencement of existence. A State, as to the individual members of which it is composed, is a fluctuating body; but in respect to the society, it is one and the same body, of which the existence is perpetually kept up by a constant succession of [34] new members. This existence continues until it is interrupted by some change affecting the being of the State.^(a)

Identity of
a State.

If this change be an internal revolution, merely altering the municipal constitution and form of government, the State remains the same; it neither loses any of its rights, nor is discharged from any of its obligations.^(b)

How affected
by internal
revolution.

The habitual obedience of the members of any political society to a superior authority must have once existed in order to constitute a sovereign State. But the temporary suspension of that obedience and of that authority, in consequence of a civil war, does not necessarily extinguish the being of the State, although it may affect for a time its ordinary relations with other States.

§ 23. Until the revolution is consummated, whilst the civil war involving a contest for the government continues, other States may remain indifferent spectators of the controversy, still continuing to treat the ancient government as sovereign, and the government *de facto* as a society entitled to the rights of war against its enemy; or may espouse the cause of the party which they believe to have justice on its side. In the first case, the foreign State fulfils all its obligations under the law of nations; and neither party has any right to complain, provided it maintains an impartial neutrality. In the latter, it becomes, of course, the enemy of the party against whom it declares itself, and the ally of the other; and as the positive law of nations makes no distinction, in this respect, between a just and an unjust war, the intervening State becomes entitled to all the rights of war against the opposite party.^(a)¹⁵

Conduct
of foreign
States to-
wards an-
other nation
involved in
civil war.

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 9, § 3. Rutherford's Inst. b. ii. c. 10, §§ 12, 13. Heffter, Das europäische Völkerrecht, § 24.

(b) Grotius, lib. ii. cap. 9, § 8. Rutherford, b. ii. c. 10, § 14. Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1-3.

(a) Vattel, Droit des Gens, liv. ii. ch. 4, § 56. Martens, Précis du Droit des Gens, liv. iii. ch. 2, §§ 79-82.

¹⁵ *Recognition of Belligerency*.—The occasion for the accordance of belligerent rights arises when a civil conflict exists within a foreign State. The reason which requires and can alone justify this step by the government of another country, is, that its own rights and interests are so far affected as to require a definition of its own relations to the parties. Where

Parties to
civil war
entitled to
rights of
war against
each other.

[35] If the foreign State professes neutrality, it is bound to allow impartially to both belligerent parties the free exercise of those rights

a parent government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights which the parent government does not concede, a recognition by a foreign State of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion, and of censure upon the parent government. But the situation of a foreign State with reference to the contest, and the condition of affairs between the contending parties, may be such as to justify this act. It is important, therefore, to determine what state of affairs, and what relations of the foreign State, justify the recognition.

It is certain that the state of things between the parent State and insurgents must amount in fact to a war, in the sense of international law; that is, powers and rights of war must be in actual exercise: otherwise the recognition is falsified, for the recognition is of a fact. The tests to determine the question are various, and far more decisive where there is maritime war and commercial relations with foreigners. Among the tests, are the existence of a *de facto* political organization of the insurgents, sufficient in character, population and resources, to constitute it, if left to itself, a State among the nations, reasonably capable of discharging the duties of a State; the actual employment of military forces on each side, acting in accordance with the rules and customs of war, such as the use of flags of truce, cartels, exchange of prisoners, and the treatment of captured insurgents by the parent State as prisoners of war; and, at sea, employment by the insurgents of commissioned cruisers, and the exercise by the parent government of the rights of blockade of insurgent ports against neutral commerce, and of stopping and searching neutral vessels at sea. If all these elements exist, the condition of things is undoubtedly war; and it may be war, before they are all ripened into activity.

As to the relation of the foreign State to the contest, if it is solely on land, and the foreign State is not contiguous, it is difficult to imagine a call for the recognition. If, for instance, the United States should formally recognize belligerent rights in an insurgent community at the centre of Europe, with no seaports, it would require a hardly supposable necessity to make it else than a mere demonstration of moral support. But a case may arise where a foreign State must decide whether to hold the parent State responsible for acts done by the insurgents, or to deal with the insurgents as a *de facto* government. (Mr. Canning to Lord Granville on the Greek War, June 22, 1826.) If the foreign State recognizes belligerency in the insurgents, it releases the parent State from responsibility for whatever may be done by the insurgents, or not done by the parent State where the insurgent power extends. (Mr. Adams to Mr. Seward, June 11, 1861, Dip. Cor. 105.) In a contest wholly upon land, a contiguous State may be obliged to make the decision whether or not to regard it as war: but, in practice, this has not been done by a general and prospective declaration, but by actual treatment of cases as they arise. Where the insurgents and the parent State are maritime, and the foreign nation has extensive commercial relations and trade at the ports of both, and the foreign nation and either or both of the contending parties have considerable naval force, and the domestic contest must extend itself over the sea, then the relations of the foreign State to this contest are far different. In such a state of things, the liability to political complications, and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers, seem to require an authoritative and general decision as to the *status* of the three parties involved. If the contest is a war, all foreign citizens and officers, whether executive or judicial are to follow one line of conduct. If it is not a war, they are to follow a totally different line. If it is a war, the commissioned cruisers of both sides may stop, search, and capture the foreign merchant-vessel; and that vessel must make no resistance, and must submit to adjudication by a prize court. If it is not a war, the cruisers of neither party can stop or search the foreign merchant-vessel; and that vessel may resist all attempts in that direction, and the ships of war of the foreign State may attack and capture any cruiser persisting in the attempt. If it is war, foreign nations must await the adjudication of prize tribunals. If it is not war, no such tribunal can be opened. If it is a war, the parent State may institute a blockade *jure gentium* of the insurgent ports, which foreigners must respect; but, if it is not a war, foreign nations, having large commercial intercourse with the country, will not respect a closing of insurgent ports by paper decrees only. If it is a war, the insurgent cruisers are to be treated by foreign citizens and officials, at sea and in port, as lawful belligerents. If it is not a war, those cruisers

which war gives to public enemies against each other; such as the right of blockade, and of [36] capturing contraband and enemy's property.^(b)

are pirates, and may be treated as such. If it is a war, the rules and risks respecting carrying contraband, or despatches, or military persons come into play. If it is not a war, they do not. Within foreign jurisdiction, if it is a war, acts of the insurgents, in the way of preparation and equipments for hostility, may be breaches of neutrality laws; while, if it is not a war, they do not come into that category, but into the category of piracy, or of crimes by municipal law.

Now, all private citizens of a foreign State, and all its executive officers and judicial magistrates, look to the political department of their government to prescribe the rule of their conduct, in all their possible relations with the parties to the contest. This rule is prescribed in the best and most intelligible manner for all possible contingencies by the simple declaration, that the contest is, or is not, to be treated as war. If the state of things requires the decision, it must be made by the political department of the government. It is not fit that cases should be left to be decided as they may arise, by private citizens, or naval or judicial officers, at home or abroad, by sea or land. It is, therefore, the custom of nations for the political department of a foreign State to make the decision. It owes it to its own citizens, to the contending parties, and to the peace of the world, to make that decision seasonably. If it issues a formal declaration of belligerent rights prematurely, or in a contest with which it has no complexity, it is a gratuitous and unfriendly act. If the parent government complains of it, the complaint must be upon one of these grounds. To decide whether the recognition was uncalled-for and premature, requires something more than a consideration of proximate facts, and the overt and formal acts of the contending parties. The foreign State is bound and entitled to consider the preceding history of the parties; the magnitude and completeness of the political and military organization and preparations on each side; the probable extent of the conflict, by sea and land; the probable extent and rapidity of its development; and, above all, the probability that its own merchant-vessels, naval officers, and consuls may be precipitated into sudden and difficult complications abroad. The best that can be said is, that the foreign State may protect itself by a seasonable decision, either upon a test case that arises, or by a general prospective [37] decision; while, on the other hand, if it makes the recognition prematurely, it is liable to the suspicion of an unfriendly purpose to the parent State. The recognition of belligerent rights is not solely to the advantage of the insurgents. They gain the great advantage of a recognized *status*, and the opportunity to employ commissioned cruisers at sea, and to exert all the powers known to maritime warfare, with the sanction of foreign nations. They can obtain abroad loans, military and naval materials, and enlist men, as against every thing but neutrality laws; their flag and commissions are acknowledged, their revenue laws are respected, and they acquire a *quasi* political recognition. On the other hand, the parent government is relieved from responsibility for acts done in the insurgent territory; its blockade of its own ports is respected; and it acquires a right to exert, against neutral commerce, all the powers of a party to a maritime war.

This subject received a full discussion in the correspondence between Mr. Adams and Earl Russell, beginning April 7, and ending Sept. 18, 1865. The principal contest was, whether the recognition by Great Britain of belligerent rights in the rebel States was 'unprecedented and precipitate,' as alleged by Mr. Adams. This belongs rather to history than to law; but the principles of international law applicable to the facts were adduced on each side. The rule Mr. Adams lays down is this: 'Whenever an insurrection against the established government of a country takes place, the duty of governments, under obligations to maintain peace and friendship with it, appears to be, at first, to abstain carefully from any step that may have the smallest influence in affecting the result. Whenever facts occur of which it is necessary to take notice, either because they involve a necessity of protecting personal interests at home, or avoiding an implication in the struggle, then it appears to be just and right to provide for the emergency by specific measures, precisely to the extent that may be required, but no farther. It is, then, facts alone, and not appearances or presumptions, that justify action. But even these are not to be dealt with farther than the occasion demands: a rigid neutrality in whatever

(b) Wheaton's Rep. iii. 610, *United States v. Palmer*;—Ib. iv. 63, *The Divina Pastora*;—Ib. 502, *The Nuestra Señora de la Caridad*.¹

[¹ 4 *Wheaton* 502 cites the title of the case: *Neustra* (sic) *Senora de la Caridad*.]—G.G.W.

But the exercise of those rights, on the part of the revolting colony or province against the metropolitan country, may be modified by the obligation of treaties previously existing between that country and foreign States.^(c)

may be done is of course understood. If, after the lapse of a reasonable period, there be little prospect of a termination of the struggle, especially if this be carried on upon the ocean, a recognition of the parties as belligerents appears to be justifiable; and at that time, so far as I can ascertain, such a step has never in fact been objected to.¹ He contends that the recognition of belligerent rights in the American colonies, in their war of independence, by France and Holland, was not made generally and for all purposes, but only to meet existing facts, and not until the presence of American war-vessels in their ports made a decision necessary; and that France and England alike seemed to consider that a recognition of belligerency was an unfriendly act, unless justified by necessity. He considers the belligerent rights of the South American provinces to have been recognized upon the same principles, and refers to late civil wars in Europe, involving States more or less maritime, where no such recognition had been made. He contends that the recognition in this instance created all the naval power the rebellion possessed, and was so influential upon its subsequent history that Great Britain and France are not entitled to the argument, that the event justified their action. Earl Russell does not seem to differ from Mr. Adams [38] on the general principles. He contends that the state of things upon which the government was required to act had no exact parallel, and must be judged by itself. He protests that the overt and formal acts of the two parties to the war are not alone to be considered; and, referring to the extent of the territory, population, and resources of the rebellion; the existence of its completely organized State and general governments; its unequivocal determination to treat as war, by sea and land, any acts of authority which the United States, on the other hand, had equally determined to exert; the long antecedent history and preparations for this revolution; and the certainty of the magnitude and extent of the war and its rapid development whenever it should begin, and that it would require the instant decision of maritime questions by neutral vessels of war and merchantmen alike,—he argues that it was necessary for England to determine at once, upon facts and probabilities, whether she should permit the right of search and blockade as acts of war, and whether the letters-of-marque or public ships of the rebels, which might appear at once in many parts of the world, should be treated as pirates or as lawful belligerents. On this subject, see further Mr. Bemis's pamphlets on the Recognition of Belligerency, Boston, 1865; letter of Mr. Harcourt ('Historicus'), London Times, March 22, 1865; Lord Lyons to Lord J. Russell, April 22, 1861; Mr. Bright's speech, March 13, 1865; Earl Russell's speech, March 23, 1865; proclamations of President Lincoln of 15th and 19th April, 1861, and of Jefferson Davis, 17th April, 1861, and of Queen Victoria, 13th May, 1861.

As to the recognition of belligerency by France and Holland in the American Revolution, see the above correspondence between Mr. Adams and Earl Russell; the Annual Register, 1776, pp. 182, 183; 1779, p. 249; Martens' Causes Célèbres, i. 113; Baron Van Zuylen to Mr. Pike, Sept. 17, 1861, U. S. Dip. Corr. 368.

Upon our claim for a recognition of our belligerency by Denmark during the war of the Revolution, and the demand for compensation for Paul Jones's prizes surrendered by Denmark to England, see Sparks's Dip. Corr. iii. 121; Sparks's Life of Franklin, viii. 407-462; U. S. Laws, vi. 61; State Papers, iii. 4; despatch of Mr. Wheaton to Mr. Upshur, Nov. 10, 1843.

During the civil war between Spain and her South American colonies, the belligerency of the latter was recognized by the United States. U. S. v. Palmer, Wheaton's Rep. iii. 610; La Divina Pastora, Ib. iv. 52; La Santissima Trinidad, Ib. vii. 337; Nueva Anna, Ib. vi. 193. So in the case of the civil war between Texas and Mexico. Mr. Forsyth to the Mexican Minister, Sept. 20, 1836; Opinions of Attorneys-General, iii. 120. As to the belligerent status of the Greeks during their war with Turkey, see Lord Russell's speech, May 6, 1861; Mr. Canning to Lord Granville, June 22, 1826; Stapleton's Life of Canning, 476. Also as to belligerent rights of the South American provinces, see the British Cabinet decision of July 23, 1824, Canning's Life, 399, British Annual Register, 1823, 146.]—D.

(c) See Part IV. ch. 3, § 3,⁽¹⁾ Rights of War as to Neutrals.

¹ For § 3 read § 416.]—G.G.W.

[37] § 24. If, on the other hand, the change be effected by external violence, as by conquest confirmed by treaties of peace, its effects upon the being of the State are to be determined by the stipulations of those treaties. The conquered and ceded country may be a portion only, or the whole of [38] the vanquished State. If the former, the original State still continues; if the latter, it ceases to exist. In either case, the conquered territory may be incorporated into the conquering State as a province, or it may be united to it as a co-ordinate State with equal sovereign rights.

Identity of a State, how affected by external violence.

§ 25. Such a change in the being of a State may also be produced by the conjoint effect of internal revolution and foreign conquest, subsequently confirmed, or modified and adjusted by international compacts. Thus the House of Orange was expelled from the Seven United Provinces of the Netherlands, in 1797, in consequence of the French Revolution and the progress of the arms of France, and a [39] democratic republic substituted in the place of the ancient Dutch constitution. At the same time the Belgic provinces, which had long been united to the Austrian monarchy as a co-ordinate State, were conquered by France, and annexed to the French republic by the treaties of Campo Formio and Luneville. On the restoration of the Prince of Orange, in 1813, he assumed the title of Sovereign Prince, and afterwards King of the Netherlands; and by the treaties of Vienna, the former Seven United Provinces were united with the Austrian Low Countries into one State, under his sovereignty.(a)

By the joint effect of internal and external violence, confirmed by treaty.

Here is an example of two States incorporated into one, so as to form a new State, the independent existence of each of the former States entirely ceasing in respect to the other; whilst the rights and obligations of both still continue in respect to other foreign States, except so far as they may be affected by the compacts creating the new State.

In consequence of the revolution which took place in Belgium, in 1830, this country was again severed from Holland, and its independence as a separate kingdom acknowledged and guaranteed by the five great powers of Europe,—Austria, France, Great Britain, Prussia, and Russia. Prince Leopold of Saxe-Cobourg having been subsequently elected king of the Belgians by the national Congress, the terms and condition of the separation were stipulated by the treaty concluded on the 15th of November, 1831, between those powers and Belgium, which was declared by the conference of London to constitute the invariable basis of the separation, independence, neutrality, and state of territorial possession of Belgium, subject to such modifications as might be the result of direct negotiation between that kingdom and the Netherlands.(b)

(a) Wheaton's Hist. Law of Nations, 492.

(b) Wheaton's Hist. Law of Nations, 538–555.

Province or
colony as-
serting its
independ-
ence, how
considered
by other
foreign
States.

§ 26. If the revolution in a State be effected by a province or colony shaking off its sovereignty, so long as the independence of the new State is not acknowledged by other powers, it may seem doubtful, in an international point of view, whether its sovereignty can be considered as complete, however it may be regarded by its own gov-^[40]ernment and citizens. It has already been stated, that whilst the contest for the sovereignty continues, and the civil war rages, other nations may either remain passive, allowing to both contending parties all the rights which war gives to public enemies; or may acknowledge the independence of the new State, forming with it treaties of amity and commerce; or may join in alliance with one party against the other. In the first case neither party has any right to complain so long as other nations maintain an impartial neutrality, and abide the event of the contest. The two last cases involve questions which seem to belong rather to the science of politics than of international law; but the practice of nations, if it does not furnish an invariable rule for the solution of these questions, will, at least, shed some light upon them. The memorable examples of the Swiss Cantons and of the Seven United Provinces of the Netherlands, which so long levied war, concluded peace, contracted alliances, and performed every other act of sovereignty, before their independence was finally acknowledged,—that of the first by the German empire, and that of the latter by Spain,—go far to show the general sense of mankind on this subject.

The acknowledgment of the independence of the United States of America by France, coupled with the assistance secretly rendered by the French court to the revolted colonies, was considered by Great Britain as an unjustifiable aggression, and, under the circumstances, it probably was so.^(a) But had the French court conducted itself with good faith, and maintained an impartial neutrality between the two belligerent parties, it may be doubted whether the treaty of commerce or even the eventual alliance between France and the United States, could have furnished any just ground for a declaration of war against the former by the British government. The more recent example of the acknowledgment of the independence of the Spanish American provinces by the United States, Great Britain, and other powers, whilst the parent country still continued to withhold her assent, also concurs to illustrate the general understanding of nations, that where a revolted province or colony has declared and shown its ability to maintain its independence, the recognition of its sovereignty by other foreign States is a question of policy and prudence only.

[41] § 27. This question must be determined by the sovereign

Recognition
of its inde-
pendence by
other foreign
States.

(a) Wheaton's Hist. Law of Nations, Part III, § 12, 220-294.⁽¹⁾ Ch. de Martens, *Nouvelles Causes Célèbres du Droit des Gens*, tom. i. 370-408.

[¹ For 220-294 read 290-294.]—G.G.W.

legislative or executive power of these other States, and not by any subordinate authority, or by the private judgment of their individual subjects. Until the independence of the new State has been acknowledged, either by the foreign State where its sovereignty is drawn in question, or by the government of the country of which it was before a province, courts of justice and private individuals are bound to consider the ancient state of things as remaining unaltered.(a)¹⁶

(a) Vesey's Ch. Rep. ix. 347, *The City of Berne v. The Bank of England*;—Edwards's Adm. Rep. i. 1, *The Manilla*, Appendix IV. Note D.;—Wheaton's Rep. iii. 324, *Hoyt v. Gelston*;—Ib. 634, *The United States v. Palmer*.

[¹⁶ *Recognition of Independence*.—It is an established general principle that each nation is to settle for itself the form in which it will live; and, when that is settled, foreign nations recognize it. So, it is purely an internal matter whether a community, previously one, shall divide itself by force or by agreement, and become two or more States. When that matter is settled, foreign nations recognize it as a fact. No questions can arise on either of these points when the parties to the change have agreed or acquiesced, and the fact has passed into history. Doubts arise where a foreign State does some act which, to a greater or less extent, recognizes a new dynasty in a State, before the old dynasty has surrendered its claim, or recognizes a new State created by rebellion, before the parent government has acquiesced. It would be a wrong view, and lead to false results, if we assumed that the foreign State is to recognize every thing possible in the new State, once for all, or to recognize nothing. There are, in truth, stages and degrees of recognition. Where the purpose of the foreign State is just and friendly, it will go no farther than its own necessities require. We have already seen [Note 15 to § 19]⁽¹⁾ that these necessities may require it to recognize *belligerent* rights in the insurgent government. Another stage in the contest may require it to treat with that government with reference to its *de facto* revenue and commercial regulations, and the rights of foreign subjects, in their persons or property, being within the territory under the control of that government, or for reparation for past and prevention of future wrongs. If the necessities of the foreign State require these acts to be done, the parent government has no cause of complaint. It is her misfortune that the insurrection has dimensions and power which exclude her authority for the time, and compel foreign nations to deal with an intruding government that has authority *de facto*. The cardinal rule is, that, while they must not interfere to affect the contest, foreign nations may and must live and trade, notwithstanding the contest. The test is,—did the necessities of the foreign State require the act, and did the act recognize no more than existed and than those necessities required? The acts referred to are special and casual and temporary, and are not inconsistent with a recognition of the fact, that the contest is still undecided. But, if the foreign State makes a general treaty with the new State, substantially as with an independent nation, with terms looking to general and permanent relations, that act is a general recognition of independence. Whether this final step is justifiable, depends upon the same tests: namely, the necessities of foreign States, and the truth of the fact implied, that the State treated with was, at the time, in the condition [42] *de facto* of an independent State. Where the necessities of the foreign State are spoken of, the term is to be understood in a liberal sense. It refers to a state of things when a just regard to the duties and rights of a government, in reference to the interests confided to it, requires its action. It is among the duties of a government to keep open to its subjects commercial intercourse with all practicable parts of the world, the privileges of travel and sojourning, and all the forms of intercourse beneficial to humanity; and to make arrangements for the protection of its citizens in these pursuits. To that end, among the frequent convulsions of States, it is often necessary for a foreign power to deal with the party *in possession* of a portion of the State. To wait till the question of right is determined, would be to suspend no small part of the life of nations. The justification of special acts short of absolute and formal recognition of sovereign independence, must depend upon the circumstances of each case, and little light can be thrown upon them by abstract statements further than have been already made. But, with reference to the final recognition by a general treaty, or by the establishing of full diplomatic intercourse, a more

[¹ For § 19 read § 23.]—G.G.W.

International effects of a change in the person of the sovereign or in the internal constitution of the State.

[42] § 28. The international effects produced by a change in the person of the sovereign or in the form of government of any State, may be considered:—

I. As to its treaties of alliance and commerce.

II. Its public debts.

III. Its public domain and private rights of property.

[43] IV. As to wrongs or injuries done to the government or citizens of another State.

positive rule can be laid down. The only test required is, that the new State shall be in fact what the recognizing state assumes it to be; for it may be conceded, once for all, that it is among the necessities of nations to have treaties and diplomatic intercourse with *existing States*. The practice of nations furnishes the best definitions and limitations of the condition of things in the new State, which will justify such a recognition. It is not necessary that the parent State or deposed dynasty should have ceased from all efforts to regain its power. On the other hand, it is necessary that the contest should have been virtually decided.

It was nearly seventy years after the declaration of independence by the Netherlands that it was recognized by Spain, in the treaty of Munster, of 1648; but, at various stages during that period, the Netherlands were dealt with as a sovereign State by all the powers of Europe, except Austria. (Dumont, v. 507; vi. 429. Mackintosh's Works, iii. 444.) The new dynasty of Braganza was established over Portugal by a revolt against Spain in 1640, and was not acknowledged by Spain until the treaty of Lisbon, of 1688; but the King of England made a general treaty with the King of Portugal, as a lawful sovereign, in 1641, on the ground of 'his solicitude to preserve the tranquility of his kingdoms, and to secure the liberty of trade of his beloved subjects'. (Dumont, vi. 238, vii. 238. Mackintosh's Works, iii. 446.) All the Continental powers treated with the Commonwealth as the English sovereignty, though the Stuarts were asserting their claim, which they afterwards made good. And, after the Revolution of 1688, and the establishment of the Orange dynasty, the refusal of France and Spain to recognize it, and their persistent recognition of the son of James II., were resented by England as acts of hostility, and led to her alliance with Holland and Germany against them. Mackintosh's Works, iii. 446.

As to the recognition of the independence of the North American provinces by France and Holland, see Phillimore's Intern. Law, iii. § 15. Martens' Causes Célèbres, [43] i. 103, 466. Canning's Speeches, v. 322. British Annual Register, 1776, 182; 1779, 249. Baron Van Zuylen to Mr. Pike, Sept. 17, 1861, U. S. Dip. Corr. 368. Correspondence between Mr. Adams and Earl Russell, April to September, 1865. The reasons assigned by England and other powers for not recognizing the French Republic of 1792 were the unsettled state of France, and the character of the acts of the Republic, and their alleged effect upon the internal affairs of neighboring nations; and the refusal of England to treat with Napoleon from 1808 to 1814 has been put upon special grounds, and not upon his want of competency to act as a sovereign. Phillimore's Intern. Law, i. § 390; ii. § 19. Canning's Speeches, v. 323. The European powers recognized successively the revolutionary governments of Louis Philippe in 1830, of the Republic in 1848, and of the Empire in 1852. In the Greek War, Great Britain, France, and Russia, as early as 1827, made consular and commercial arrangements with Greece, and recognized her independence formally in 1832. The independence of Belgium was recognized at once, in 1830, without the consent of Holland. (But these cases of Greece and Belgium are both instances of forcible intervention, and not of mere recognition.)

The independence of the South American republics was recognized first by the United States, and tardily by England, but by both upon the ground, that after long-recognized belligerency and the practically unobstructed exercise by them of sovereign powers, Spain, separated by an ocean, had abandoned actual efforts for their reduction, and only clung to a nominal right. Canning's speech, Feb. 4, 1825. Hansard, xii. ⁽¹⁾ 78. Mackintosh's speech, June 15, 1824. Mackintosh's Works, iii. 749. President Jackson's message, Dec. 21, 1836. In 1818, Mr. Clay proposed in Congress a mission to the South American provinces, to express the sympathy of the United States, and with a view to enter into friendly relations with them

[¹ For Hansard, xii. read Hansard, 2d series, xii.]—G.G.W.

§ 29. Treaties are divided by the text-writers into *personal* and *real*.^{Treaties.} The former relate exclusively to the persons of [44] the contracting

at a future day. The proposition was rejected by a vote of 115 to 45, on the ground of the still unsettled state of the provinces and the continuance of actual war. At the next session of Congress, in November 1818, President Monroe, in his annual message, referred to the condition of those provinces; to the probable mediation of the allied powers; and expressed his hope and belief that they would not intervene by force, and his satisfaction with the course of neutrality adopted by the United States. In his message of December, 1819, he says that Buenos Ayres 'still maintains unshaken the independence which it declared in 1816, and has enjoyed since 1810. Like success has attended⁽¹⁾ Chili and the provinces north of La Plata, and⁽²⁾ likewise Venezuela.' He speaks of the situation and resources of the provinces as giving them advantages very difficult for Spain, so distant a power, to overcome; and adds: 'The steadiness, consistency, and success, with which they have pursued their object, as evinced more particularly by the undisputed⁽³⁾ sovereignty which Buenos Ayres has so long enjoyed, evidently give them a strong claim to the favorable consideration of other nations. These sentiments on the part of the United States have not been withheld from other powers, with whom it is desirable to act in concert. Should it become manifest to the world, that the efforts of Spain to subdue these provinces will be fruitless, it may be presumed that the Spanish Government itself will give up the contest. In producing such a determination, it cannot be doubted that the opinions of friendly powers who have taken no part in the controversy will have their merited influence.' At the same time, the President [44] recommended a revision of the laws for the preservation of neutrality, so as to give them greater effect. In his message of December,⁽⁴⁾ 1820, he refers to the continued success of the revolutionists, while 'in no part of South America has Spain made any impression on the Colonies;' and, expressing the hope that the change in the government of Spain will lead to the recognition of their independence by that power, adds, 'To promote that result by friendly counsels with other powers, including Spain herself, has been the uniform policy of this government.' In February, 1821, Mr. Clay again brought forward a resolution for acknowledging the independence of the provinces, which passed the House of Representatives, but did not pass the Senate. In his second inaugural address, in March, 1821, Mr. Monroe renews expressions of hope that the change in the government of Spain will lead to a recognition, but still advises neutrality. In his message of December, 1821, he says: 'It has long been manifest that it would be impossible for Spain to reduce these colonies by force, and equally so that no conditions short of their independence would be satisfactory to them.' In January, 1822, in accordance with a recommendation of the President a resolution for the acknowledgment of the independence of Mexico and the Spanish provinces of South America was adopted by Congress, by a nearly unanimous vote, and diplomatic missions established, to which the President soon afterwards made appointments. It was many years after this, that their independence was acknowledged by Spain.

In Texas, the declaration of independence was made in December, 1835, after a year of fighting. The decisive battle of San Jacinto was in April 1836, which practically ended the war; and Mexico did not again invade Texas, though she still refused to acknowledge its independence. During the summer of 1836, Congress passed a resolution to the following effect: 'That the independence of Texas ought to be acknowledged by the United States whenever satisfactory information should be received that it had in successful operation a civil government capable of performing the duties and fulfilling the obligations of an independent power.'

In December, 1836, President Jackson sent a special message, recommending delay in the recognition. He says: 'The acknowledgment of a new State as independent, and entitled to a place in the family of nations, is at all times an act of great delicacy and responsibility; but more especially so when such State has forcibly separated itself from another, of which it had formed an integral part, and which still claims dominion over it. A premature recognition under these circumstances, if not looked upon as a justifiable⁽⁵⁾ cause of war, is always liable to

[¹ For has attended *read* has also lately attended.]—G.G.W.

[² For La Plata, and *read* La Plata bordering on it and.]—G.G.W.

[³ For undisputed *read* undisturbed.]—G.G.W.

[⁴ For December *read* November.]—G.G.W.

[⁵ For as a justifiable *read* as justifiable.]—G.G.W.

parties, such as family alliances and treaties guaranteeing the throne to a particular sovereign and his family. They expire, of course,

be regarded as a proof of an unfriendly spirit to one of the contending parties. All questions relative to the government of foreign nations have⁽ⁱ⁾ been treated by the United States as questions of fact only; and our predecessors have cautiously abstained from deciding upon them, until the clearest evidence was in their possession to enable them not only to decide correctly, but to shield their decisions from every unworthy imputation. . . . In the contest between Spain and her revolted colonies, we stood aloof, and waited not only until the ability of the new States to protect themselves was fully established, but until the danger of their being again subjugated had entirely passed away. Then, and not until then, they were⁽ⁱⁱ⁾ recognized. Such was our course in regard to Mexico herself. The same policy was observed in all the disputes arising⁽ⁱⁱⁱ⁾ out of the separation into distinct governments of those Spanish-American States which^(iv) began [45] or carried on the contest with the parent country, united under one form of government. We acknowledged the separate independence of New Grenada, of Venezuela, and of Ecuador, only after their independent existence was no longer a subject of dispute, or was actually acquiesced in by those with whom they had been previously united. It is true, that, with regard to Texas, the civil authority of Mexico has been expelled, its invading army defeated, the chief of the republic himself captured, and all present power to control the newly organized government of Texas annihilated within its confines. But, on the other hand, there is, in appearance at least, an immense disparity of physical force on the side of Texas.^(v) The Mexican Republic, under another executive, is rallying its forces under a new leader, and menacing a fresh invasion to recover its lost dominion. Upon the issue of this threatened invasion the independence of Texas may be considered as suspended; and, were there nothing peculiar in the relative situation of the United States and Texas, our acknowledgment of its independence at such a crisis could hardly^(vi) be regarded as consistent with the^(vii) prudent reserve with which we have heretofore held ourselves bound to treat all similar questions. . . . Prudence, therefore, seems to dictate that we should still stand aloof and maintain our present attitude, if not until Mexico itself or one of the great foreign powers shall recognize the independence of the new government, at least until the lapse of time or the course of events shall have proved, beyond cavil or dispute, the ability of the people of that country to maintain their separate sovereignty, and to uphold the government established^(viii) by them.'

The attempt to invade Texas having been abandoned by Mexico, her independence was acknowledged by the United States in March, 1837, and by England and France, 1840.

Of this history, Mr. Webster said in 1842, in his official letter to Mr. Thompson, in answer to the complaints of Mexico: 'It is true that the independence of Texas has not been recognized by Mexico. It is equally true that the independence of Mexico has only been recently recognized by Spain: but the United States, having acknowledged both the independence of Mexico before Spain acknowledged it, and the independence of Texas, although Mexico has not yet acknowledged it, stands in the same relation towards both those governments. . . . No effort for the subjugation of Texas has been made by Mexico, from the time of the battle of San Jacinto on the 4th April, 1836, to^(ix) the commencement of the present year; and, during all this period, Texas has maintained an independent government, carried on commerce, made^(x) treaties with nations in both hemispheres, and kept aloof all attempts at invading her territory.'

The action of the United States with reference to Hungary, in 1849, has been a subject of some discussion. Hungary, although long a component part of the Austrian empire, had been, for centuries before, an independent kingdom, with its distinct history; and the Hungarians had still strong national feeling, and a different language and very different institutions from those of Austria. In the general disturbance of 1848, the Hungarians established a government completely organized in all its parts, with a large army, and successfully resisted

[ⁱ For nations have read nations whether of the Old or the New World have.]—G.G.W.

[ⁱⁱ For they were read were they.]—G.G.W.

[ⁱⁱⁱ For arising read growing.]—G.G.W.

[^{iv} For which read who.]—G.G.W.

[^v For Texas read Mexico. (Sen. Doc. 24th Cong. 2d Sess. No. 20).]—G.G.W.

[^{vi} For hardly read scarcely.]—G.G.W.

[^{vii} For the read that.]—G.G.W.

[^{viii} For established read constituted.]—G.G.W.

[^{ix} For 4th April, 1836, to read 21st day of April 1836, until.]—G.G.W.

[^x For commerce, made read commerce, and made.]—G.G.W.

on the death of the king or the extinction of his family. The latter relate solely to the subject-matters of the [45] convention, indepen-

the Austrian attempts to subjugate it. A civil war of such an origin presents a very different case from one originating in an insurrection of a portion of a single nation, where the insurgents act together for the first time, and make an original experiment at forming [46] themselves into a nationality. Such a movement as that of Hungary more rapidly and naturally takes form and consistency, or, rather, gives an independent direction to its ancient and never-abandoned form and consistency; and its chances for success are better. In the autumn of 1848, M. Kossuth, the chief of the insurrectionary movement, applied to Mr. Stiles, the United States Chargé d'Affaires at Vienna, to use his good offices with the Imperial Government, with a view to a cessation of hostilities. Mr. Stiles, without instructions from home, opened communication with the Imperial Government, and was received by the Imperial ministers, Princes Schwarzenberg and Windischgrätz, with respect, and expressions of thanks for his friendly purpose. Some Hungarian agents came to the United States, and urged upon the government the recognition of their independence, and the making of a treaty of commerce. President Taylor declined all immediate action in that direction; but sent Mr. Dudley Mann to Europe, with secret instructions 'to obtain minute and reliable information in regard to Hungary in connection with the affairs of adjoining countries, the probable issue of the present revolutionary movements, and the chances he⁽¹⁾ may have of forming commercial arrangements with that power favorable to the United States;' and, in another sentence, 'The object of the President is to obtain information in regard to Hungary and her resources and prospects, with a view to an early recognition of her independence, and the formation of commercial relations with her.'

On this duty, Mr. Mann went to the neighborhood of the contending parties, in 1849, but did not enter Hungary, or hold any direct communication with her leaders; and reported that he found the prospects of the revolution less promising than they had been, or had been believed to be, and advised against the recognition of independence. The intervention of Russia, with her vast military force, had overborne the until then successful movement. Mr. Mann, in compliance with his instructions, forbore to give publicity to his mission; and the nature of his instructions first became known by the communication made by President Taylor to the Senate of the United States, 28th March, 1850, after the Hungarian war was ended. M. Hülsemann, the Austrian Chargé d'Affaires at Washington, inquiring of Mr. Clayton, Secretary of State, was told that 'Mr. Mann's mission had no other object in view than to obtain reliable information as to the true state of affairs in Hungary by personal observation.'

This was all that was done by the United States. The state of things in Hungary, in 1849, would doubtless have justified any nation in recognizing the belligerency of Hungary, if her own relations with the parties to the contest had been such as to require such a declaration, as a guide to her own officials and private citizens, and as a notice to both parties. But, as the United States had no such complication, and no immediate cause to apprehend it, the government did no act in the nature of such a recognition; and the mission of Mr. Mann was secret and confidential, and did not become known so as to have influenced the result.

M. Hülsemann, in a letter to Mr. Webster, Secretary of State, of Sept. 30, 1850, re-opens the subject, and complains of the mission as a past transaction, on the ground that it was a violation of the law of nations, and unfriendly to Austria. He objects to the language used in the instructions, especially the characterizing of 'the rebel chief Kossuth as an illustrious man,' and of the terms in which the Austrian [47] system and the intervention of Russia, the ally of Austria, are spoken of, as offensive to Austria; and adds, that the publicity given to the instructions by the communication to the Senate, requires the Austrian Government to make a formal protest against them.

Mr. Webster replied, by letter of Dec. 21, 1850, that the United States regards a communication from one department of its government to another, as from the President to the Senate, as a domestic communication, of which ordinarily no foreign State has cognizance; and that great inconvenience would result from making such communications matter of diplomatic correspondence and discussion. Mr. Webster says: 'The undersigned re-asserts to M. Hülsemann and to the Cabinet of Vienna, and in the presence of the world, that the steps

[¹ *For he read we.*]—G.G.W.

dently of the persons of the contracting parties. They continue to bind the State, whatever intervening changes may take place in its internal constitution, or in the persons of its rulers. The State continues the same, notwithstanding such change, and consequently the treaty relating to national objects remains in force so long as the nation exists as an independent State. The only exception to this general rule, as to *real* treaties, is where the convention relates to the form of [47] government itself, and is intended to prevent any such change in the internal constitution of the State.(a)

The correctness of this distinction between personal and real treaties, laid down by Vattel, has been questioned by more modern public jurists as not being logically deduced from acknowledged principles. Still it must be admitted that certain changes in the internal constitution of one of the contracting States, or in the person of its sovereign, may have the effect of annulling pre-existing treaties be-

taken by President Taylor, now protested against by the Austrian Government, were warranted by the law of nations, and agreeable to the usages of civilized States.' As to the language in which the confidential instructions to Mr. Mann were couched, Mr. Webster says they were confidential between the President and his agent, 'in reference to which the United States cannot admit the slightest responsibility to the government of His Imperial Majesty. No State, deserving the appellation of independent, can permit the language in which it may instruct its own officers, in the discharge of their duties to itself, to be called in question, under any pretext, by a foreign power.' He reminds M. Hülsenmann that they were communicated to the Senate after the war was over; and that Austria obtained its first knowledge of the instructions from that communication.

It would seem that the only objection to the course of the United States was, that it showed a desire to be prompt in recognizing Hungary. This Mr. Webster admits. He says that the people of the United States have a deep interest in the movements made by a nation to regain its independence with institutions like our own, which we deem to be real blessings to a people, against the force of governments which are not only hostile to those institutions, but affect to consider them as never having a lawful origin: not being derived from the consent of those holding thrones by divine right. Mr. Webster's position is, that, in such a contest, governments hostile to popular institutions must expect to see demonstrations of sympathy and feeling by the people of a free country, and expressions of it may appear in confidential domestic communications of the government itself; but such powers must be content, if the government, in its relations with them during the contest, performs faithfully the duties enjoined upon it by international law, gives no public and official moral support to the insurrection, abstains from recognizing independence until it exists in fact, and executes faithfully the duties of neutrality in the contest, as regards all material aid. In reply to M. Hülsenmann's complaint of the language of the President towards Russia, he reminds the writer that Russia has made no complaint. Mr. Webster's letter is, no doubt, a grave and skilful censure of Austria and of her system and relations to freedom, and would have been open to the charge of being undiplomatic, if the note of M. Hülsenmann had not given Mr. Webster fair opportunity, if not provocation, to introduce the topics into his reply. Webster's Works, vi. 488-506.

As a point in international law, the transaction has little significance, as the United States undoubtedly did no act in the way of recognizing the independence or even belligerency of Hungary, but confidentially and secretly took its own mode of making sure of its ground in being the earliest, consistently with international law, to recognize the independence of a nation with whose cause it sympathized. The episode belongs rather to history, as indicating the policy and feeling of the United States.

See note 41, on Intervention in Mexico.]—D.

(a) Vattel, *Droit des Gens*, liv. ii. ch. 12, §§ 183-197.

tween their respective governments. The obligation of treaties, by whatever denomination they may be called, is founded, not merely upon the contract itself, but upon those mutual relations between the two States which may have induced them to enter into certain engagements. Whether the treaty be termed real or personal, it will continue so long as these relations exist. The moment they cease to exist, by means of a change in the social organization of one of the contracting parties, of such a nature and of such importance as would have prevented the other party from entering into the contract had he foreseen this change, the treaty ceases to be obligatory upon him.¹⁷

§ 30. As to public debts—whether due to or from the revolutionized State—a mere change in the form of government, or in the person of the ruler, does not affect their obligation. The essential form of the State, that which constitutes it an independent community, remains the same; its accidental form only is changed. The debts being contracted in the name of the State, by its authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution.^(a) The new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations of the former government. Public debts.

It becomes entitled to the public domain and other property [49] of the State, and is bound to pay its debts previously contracted.^(b)¹⁸

[¹⁷ The separation of Belgium from the kingdom of the Netherlands, and the change wrought thereby in the relations of Holland with the great powers, were held by the United States to justify it in withdrawing from an agreement to accept the King of the Netherlands as an umpire on the north-eastern boundary question. When Texas agreed to unite itself to the Republic of the United States, France and England notified her that she did not thereby cease to be bound by her treaty obligations with those powers. Lord Aberdeen to Mr. Eliot,⁽¹⁾ Dec. 3, 1845. Sen. Doc. vii. 375.]—D.

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 9, §§ 8, 1-3. Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1, 2, 3.

(b) Heffter, Das europäische Völkerrecht, § 24.⁽¹¹⁾ Bona non intelliguntur nisi deducto ære alieno.

[¹⁸ *Texan Bonds*.—By the annexation of Texas to the United States, the power to lay and collect duties on imports passed to the latter: but Texas retained her public lands, pledged to the payment of her debts; and the act of annexation declared that they should in no event be a charge on the United States. Afterwards, the United States took portions of those public lands, agreeing to pay therefor ten millions of dollars, half to be retained until the holders of the bonds of Texas, for which her customs duties were pledged, should release their claims. By a later act, the United States reserved three-quarters of the sum, to be paid *pro rata* among the bondholders, on their releasing their claims. Some of these bondholders were British subjects; and the claims of one (James Holford) were submitted to the mixed commission established under the convention of Feb. 8, 1853; but the commission decided that the claims were not within the jurisdiction of the commission, as they had never been matter of diplomatic demand by Great Britain on the United States. Report of the Commission under the Convention of 1853, 382-426. U. S. Laws, v. 797; viii. 446; x. 617.

It certainly would not be satisfactory to say that the United States discharges its obligation to the creditors of Texas, to whom her customs were pledged, by paying only the amount of the customs received. The United States determines what those duties shall be, in reference

[¹ For Eliot read Elliot.]—G.G.W.

[¹¹ For § 24 read § 25.]—G.G.W.

Public domain and private rights of property.

§ 31. As to the public domain and private rights of property. If the revolution be successful, and the internal change in the constitution of the State is finally confirmed by the event of the contest, the public domain passes [50] to the new government; but this mutation is not necessarily attended with any alteration whatever in private rights of property.

It may, however, be attended by such a change: it is competent for the national authority to work a transmutation, total or partial, of the property belonging to the vanquished party; and if actually confiscated, the fact must be taken for right. But to work such a transfer of proprietary rights, some positive and unequivocal act of confiscation is essential.

If, on the other hand, the revolution in the government of the State is followed by a restoration of the ancient order of things, both public and private property, not actually confiscated, revert to the original proprietor on the restoration of the legitimate government, as in the case of conquest they revert to the former owners, on the evacuation of the territory occupied by the public enemy. The national domain, not actually alienated by any intermediate act of the State, returns to the sovereign along with the sovereignty. Private property, temporarily sequestered, returns to the former owner, as in the case of such property recaptured from an enemy in war on the principle of the *jus postliminii*.

But if the national domain has been alienated, or the private property confiscated by some intervening act of the State, the question as to the validity of such transfer becomes more difficult of solution.

Even the lawful sovereign of a country may, or may not, by the

to the interests and policy of the whole republic. The condition of Texas is changed by her annexation. The new government has a large control over the material resources of the inhabitants, in the way of internal revenues, excise, or direct taxation, in its demands on the services of the people, and in the debts it can impose; in fact, the entire public system of Texas has passed into other hands, and no such state of things any longer exists as that to which the creditor looked. It may be better or worse, but it is not the same; and, if the duties laid by the United States and collected in Texan ports did not in fact pay the debts, it would be unjust for the United States to limit the payment of the creditor to them. The truth is, by the annexation the United States changed the nature of the thing pledged, and is bound generally to do equity to the creditor.

In the separations and re-arrangements of nations in Europe, special provisions are usually made for the payment of public debts; and the principle seems admitted, that, in case of a division of a State, each new State is bound for the whole debt contracted by the former; and, in the case of a union of States, it seems equally clear that, as the whole must defend the part in war, which is the international process of attachment, it must practically pay the debt, although the foreign power may look only to the people and land of the State which made the contract. The formation of the new State so alters the nature of all the securities the creditor looked to, that the new State has a general obligation to see that he does not suffer by the change.

See Art. 13 of treaty of 1839, for the separation of Belgium; and the treaty of Zurich, ceding Lombardy to Sardinia.]—D.

particular municipal constitution of the State, have the power of alienating the public domain. The general presumption, in mere internal transactions with his own subjects, is, that he is not so authorized. (a) But in the case of international transactions, where foreigners and foreign governments are concerned, the authority is presumed to exist, and may be inferred from the general treaty-making power, unless there be some express limitation in the fundamental laws of the State. So, also, where foreign governments and their subjects treat with the actual head of the State, or the government *de facto*, recognized by the acquiescence of the nation, for the acquisition of any portion of the public domain or of private confiscated property, the acts of such government must, on principle, be considered valid by the lawful sover[51]eign on his restoration, although they were the acts of him who is considered by the restored sovereign as an usurper. (b) On the other hand, it seems that such alienations of public or private property to the subjects of the State, may be annulled or confirmed, as to their internal effects, at the will of the restored legitimate sovereign, guided by such motives of policy as may influence his counsels, reserving the legal rights of *bonæ fidei* purchasers under such alienation to be indemnified for ameliorations. (c)

Where the price or equivalent of the property sold or exchanged has accrued to the actual use and profit of the State, the transfer may be confirmed, and the original proprietors indemnified out of the public treasury, as was done in respect to the lands of the emigrant French nobility, confiscated and sold during the revolution. So, also, the sales of the national domains situate in the German and Belgian provinces, united to France during the revolution, and again detached from the French territory by the treaties of Paris and Vienna in 1814 and 1815, or in the countries composing the Rhenish Confederation in the kingdom of Italy, and the Papal States, were, in general, confirmed by these treaties, by the Germanic Diet, or by the acts of the respective restored sovereigns. But a long and intricate litigation ensued before the Germanic Diet, in respect to the alienation of the domains in the countries composing the kingdom of Westphalia. The Elector of Hesse Cassel and the Duke of Brunswick refused to confirm these alienations in respect to their territory, whilst Prussia, which power had acknowledged the King of Westphalia, also acknowledged the validity of his acts in the countries annexed to the Prussian dominions by the treaties of Vienna. (d)

(a) Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1-3. Vattel, Droit des Gens, liv. i. chap. 21, §§ 260, 261.

(b) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 14, § 16. (1)

(c) Klüber, Droit des Gens, sec. ii. chap. 1, § 258.

(d) Conversations-Lexikon, art. *Domänen-Verkauf*. Heffter, Das europäische Völker-

[1 For § 16 read § 11.]—G.G.W.

Wrongs and
injuries.

§ 32. As to wrongs or injuries done to the government or citizens of another State;—it seems, that, on strict principle, the nation continues responsible to other States for the damages incurred for such wrongs or injuries, notwithstanding an intermediate change in the form of its government, or in the persons of its rulers. This principle was applied in all its rigor by the victorious allied powers in their treaties of peace with France in 1814 and 1815. More recent examples of its practical application have occurred in the negotiations between the United States and France, Holland, and Naples, relating to the spoliation committed on American commerce under the government of Napoleon and the vassal States connected with the French empire. The responsibility of the restored government of France for those acts of the preceding ruler was hardly denied by it, even during the reigns of the Bourbon kings of the elder branch, Louis XVIII. and Charles X.; and was expressly admitted by the present government (Louis Philippe's) in the treaty of indemnities concluded with the United States in 1831. The application of the same principle to the measures of confiscation adopted by Murat in the kingdom of Naples was contested by the restored government of that country; but the discussions which ensued were at last terminated, in the same manner, by a treaty of indemnities concluded between the American and Neapolitan governments.¹⁹

Sovereign
States de-
fined.

§ 33. A sovereign State is generally defined to be any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign powers.(a)

This definition, unless taken with great qualifications, cannot be admitted as entirely accurate. Some States are completely sovereign and independent, acknowledging no superior but the Supreme Ruler and Governor of the universe. The sovereignty of other States is limited and qualified in various degrees.

Equality of
sovereign
States.

All sovereign States are equal in the eye of international law, whatever may be their relative power. The sovereignty of a particular State is not impaired by its occasional obedience to the commands of other States, or even the habitual influence exercised by them over its councils. It is only when this obedience, or this influence, assumes the form of express compact, that the sovereignty of the State, inferior in power, is legally affected by its connection with the other. Treaties of

recht, § 188. Klüber, *Oeffentliches Recht des deutschen Bundes*, § 169. Rotteck und Welcker, *Staatslexikon*, art. *Domänenkäufer*.

[¹⁹ The British and French governments made reclamations on Mexico for property of British subjects seized by a faction, which, during a civil war, was in actual possession of the capital. The tripartite treaty between Great Britain, France, and Spain of Oct. 31, 1861, and Lord John Russell's instructions to Sir C. Wycke, 1861. *Annual Register*, 1861, p. 216.] (D.—D.

(a) Vattel, *Droit des Gens*, liv. i. chap. 1, § 4.

[¹ For 216.] read 216.]]—G.G.W.

equal alliance, freely contracted between independent States, do not impair [53] their sovereignty. Treaties of unequal alliance, guarantee, mediation, and protection, may have the effect of limiting and qualifying the sovereignty according to the stipulations of the treaties.

§ 34. States which are thus dependent on other States, in respect to the exercise of certain rights, essential to the perfect external sovereignty, have been termed semi-sovereign States.^(a)

Semi-sovereign States.

Thus the city of Cracow, in Poland, with its territory, was declared by the Congress of Vienna to be a perpetually free, independent, and neutral State, under the protection of Russia, Austria, and Prussia.^(b)

City of Cracow.

By the final act of the Congress of Vienna, Art. 9, the three great powers, Austria, Russia, and Prussia, mutually engaged to respect, and cause to be respected, at all times, the neutrality of the free city of Cracow and its territory; and they further declared that no armed force should ever be introduced into it under any pretext whatever.

It was at the same time reciprocally understood and expressly stipulated that no asylum or protection should be granted in the free city or upon the territory of Cracow to fugitives from justice, or deserters from the dominions of either of the said high powers, and that upon a demand of extradition being made by the competent authorities, such individuals should be arrested and delivered up without delay under sufficient escort to the guard charged to receive them at the frontier.^(c)

§ 35. By the convention concluded at Paris on the 5th of November, 1815, between Austria, Great Britain, Prussia, and Russia, it is declared (Art. 1,) that the islands of Corfu, Cephalonia, Zante, St. Maura, Ithaca, Cerigo, and Paxo, with their dependencies, shall form a single, free, and independent State; under the denomination of the United States of the Ionian Islands. The second article provides that this State shall be placed under the immediate and exclusive protection of His [54] Majesty the King of the United Kingdom of Great Britain and Ireland, his heirs and successors. By the third article it is provided that the United States of the Ionian Islands shall regulate, with the approbation of the protecting power, their interior organization: and to give all parts of this organization the consistency and necessary action, His Britannic Majesty will devote particular atten-

United States of the Ionian Islands.

(a) Klüber, *Droit des Gens Moderne de l'Europe*, § 24. Heffter, *Das europäische Völkerrecht*, § 19.

(b) *Acte du Congrès de Vienne du 9 juin, 1815*, arts. 6, 9, 10.

(c) Martens, *Nouveau Recueil*, tom. ii. 386. Klüber, *Acten des Wiener Congresses*, Band V. § 138. By a Convention signed at Vienna, Nov. 6, 1846, between Russia, Austria, and Prussia, the city of Cracow was annexed to the Empire of Austria. The governments of Great Britain, France, and Sweden protested against this proceeding as a violation of the Federal act of 1815.

tion to the legislation and general administration of those States. He will appoint a Lord High Commissioner who shall be invested with the necessary authority for this purpose. The fourth article declares, that, in order to carry into effect without delay these stipulations, the Lord High Commissioner shall regulate the forms of convoking a legislative assembly, of which he shall direct the operations, in order to frame a new constitutional charter for the State, to be ratified by His Britannic Majesty. The fifth article stipulates, that, in order to secure to the inhabitants of the United States of the Ionian Islands the advantages resulting from the high protection under which they are placed, as well as for the exercise of the rights incident to this protection, His Britannic Majesty shall have the right of occupying and garrisoning the fortresses and places of the said States. Their military forces shall be under the orders of the commander of the troops of His Britannic Majesty. The sixth article provides that a special convention with the government of the United States of the Ionian Islands shall regulate, according to their revenues, the object relating to the maintenance of the fortresses and the payment of the British garrisons, and their numbers in the time of peace. The same convention shall also ascertain the relations which are to subsist between this armed force and the Ionian government. The seventh article declares that the merchant flag of the Ionian Islands shall bear, together with the colors and arms it bore previous to 1807, those which His Britannic Majesty may grant as a sign of the protection under which the United Ionian States are placed; and to give more weight to this protection, all the Ionian ports are declared, as to honorary and military rights, to be under the British jurisdiction, commercial agents only, or consuls charged only with the care of commercial relations, shall be accredited to the United States of the Ionian Islands; and they shall be subject to the same regulations to which consuls and commercial agents are subject in other independent States.(a)

[55] On comparing this act with the stipulations of the treaty of Vienna relating to the Republic of Cracow, a material distinction will be perceived between the nature of the respective sovereignty granted to each of these two States. The 'free, independent, and strictly neutral city of Cracow' is completely sovereign, though under the protection of Austria, Prussia, and Russia; whilst the Ionian Islands, although they are to form 'a single free and independent State,' under the protection of Great Britain, are closely connected with the protecting power both by the treaty itself and by the constitution framed in pursuance of its stipulations, in such a manner as materially to abridge both its internal and external sovereignty. In practice, the United States of the Ionian Islands are not only constantly obedient to the

(a) Martens, *Nouveau Recueil*, tom. ii. 663.

commands of the protecting power, but they are governed as a British colony by a Lord High Commissioner named by the British crown, who exercises the entire executive, and participates in the legislative power with the Senate and legislative Assembly, under the constitution of the State.^(b)²⁰

§ 36. Besides the free city of Cracow and the United States of the Ionian Islands, several other semi-sovereign or dependent States are recognized by the existing public law of Europe. These are:

1. The Principalities of Moldavia, Wallachia, and Servia, under the *suzeraineté* of the Ottoman Porte and the protectorate of Russia, as defined by the successive treaties between these two powers, confirmed by the treaty of Adrianople, 1829.^(a)²¹

[56] 2. The Principality of Monaco, which had been under the Protectorate of France from 1641 until the French Revolution, was replaced under the same protection by the treaty of Paris, 1814, art. 3, for which was substituted that of Sardinia by the treaty of Paris, 1815, art. 1.^(b)²²

(b) Martens, *Précis du Droit des Gens*, liv. i. ch. 2, § 20, note a, 3^{me} édition.

[²⁰ During the Crimean war, the British courts held that the Ionian Islands were not parties, not being so made by Great Britain; and that their vessels were not forbidden to trade in Russian ports. The *Leucade*, *Jurist*, i. 549.⁽¹⁾

In 1864, the protectorate of Great Britain over the Ionian Republic was withdrawn, and those islands united to the kingdom of Greece. This was effected by the course described in the speech of the Queen of Great Britain to Parliament, in that year:—

‘Her Majesty having addressed herself to the powers who were contracting parties to the treaty by which the Ionian Republic was placed under the protectorate of Great Britain, and having obtained their consent to the annexation of that republic to the kingdom of Greece, and the States of the Ionian Republic having agreed thereto, the republic of the seven islands has been formally united to the kingdom of Greece; and Her Majesty trusts that the union so made will conduce to the welfare and prosperity of all the subjects of His Majesty the King of the Hellenes.’—D.

(a) Wheaton's *Hist. of the Law of Nations*, 556–560.

[²¹ The result of various changes in the condition of the principalities is, that, in 1861, Moldavia and Wallachia were formed into one province, under the name of Roumania, or, more commonly, Moldo-Wallachia, with one legislature and one hospodar. The united legislature met in February, 1862. The *suzeraineté* of Turkey continues, and the principalities are guaranteed their privileges and immunities by the parties to the convention of 19th August, 1858, and the treaty of Paris of 30th March, 1856. *Almanach de Gotha*, 1862,⁽¹¹⁾ 962, 966. *Annuaire des deux Mondes*, 1858, pp. 3, 689; 1859, p. 6–12;⁽¹¹⁾ 1861, p. 560.

As to Servia, it was settled by the treaty of Paris of 1856, that it should be under the *suzeraineté* of the Porte, but with an hereditary prince, whose authority and the rights and immunities of the Servians are under the guaranty of the parties to the treaty. *Almanach de Gotha*, 1861, p. 884.

After the campaign of 1862, Turkey insisted on her sovereign rights over Montenegro, and provided, by a convention to which the prince was compelled to agree, that Turkish garrisons should be received in the country. The convention recognizes the *suzeraineté* of the Porte. Russia remonstrated against these terms, but England declined to interfere. Lord Russell to the English Ambassador at St. Petersburg, Sept. 30, 1862. Prince Gortschakoff to Baron Brunow, 28 Sept., 1862.]—D.

(b) Martens, *Nouveau Recueil*, tom. ii. pp. 5, 687.

[²² Sardinia had included the communes of Monaco and Nice; and, when Nice was ceded

[¹ For *Jurist*, i. 549 read *Jurist*, i. N.S. 549.]—G.G.W.

[¹¹ For 1862 read 1863.]—G.G.W.

[¹¹ For 6–12 read 710.]—G.G.W.

3. The Republic of Polizza in Dalmatia under the Protectorate of Austria.(c)²³

4. The former Germanic Empire was composed of a great number of States, which, although enjoying what was called territorial superiority, (*Landeshoheit*), could not be considered as completely sovereign, on account of their subjection to the legislative and judicial power of the emperor and the empire. These have all been absorbed in the sovereignty of the States composing the present Germanic Confederation, with the exception of the Lordship of Kniphausen, on the North Sea, which still retains its former feudal relation to the Grand Duchy of Oldenburgh, and may, therefore, be considered as a semi-sovereign State.(d)

5. Egypt had been held by the Ottoman Porte, during the dominion of the Mamelukes, rather as a vassal State than as a subject province. The attempts of Mehemet Ali, after the de[57]struction of the Mamelukes, to convert his title as a prince-vassal into absolute independence of the Sultan, and even to extend his sway over other adjoining provinces of the empire, produced the convention concluded at London the 15th July, 1840, between four of the great European powers,—Austria, Great Britain, Prussia, and Russia,—to which the Ottoman Porte acceded. In consequence of the measures subsequently taken by the contracting parties for the execution of this treaty, the hereditary Pachalick of Egypt was finally vested by the Porte in Mehemet Ali, and his lineal descendants, on the payment of an annual tribute to the Sultan, as his *suzerain*. All the treaties and all the laws of the Ottoman Empire were to be applicable to Egypt, in the same manner as to other parts of the empire. But the Sultan consented that, on condition of the regular payment of this tribute, the Pacha should collect, in the name and as the delegate of the Sultan, the taxes and imposts legally established, it being, moreover, understood that the Pacha should defray all the expenses of the civil and military administration; and that the military and naval force maintained by him should always be considered as maintained for the service of the State.(e)

§ 37. Tributary States, and States having a feudal relation to each other, are still considered as sovereign, so far as their sovereignty is not affected by this relation. Thus, it is evident that the tribute, formerly paid by the principal maritime powers of Europe to the Barbary States, did not at all affect the sovereignty and independence of the former.

by Italy to France, the Prince of Monaco, by treaty of 2 Feb., 1861, ceded his little territory, except the city, to France, for a pecuniary indemnity.]—D.

(c) Martens, *Précis du Droit des Gens*, liv. i. chap. 2, § 20.

[²³ Heffter, *Das europ. Völkerrecht*, § 20, note.]^(d)—D.

(d) Heffter, *Das europ. Völkerrecht*, § 19.

(e) Wheaton, *Hist. Law of Nations*, 572–583.

[¹ For note.] read note 2.]—G.G.W.

So also the King of Naples had been a nominal vassal of the Papal See, ever since the eleventh century; but this feudal dependence, abolished in 1818, was never considered as impairing the sovereignty of the kingdom of Naples.^(a)

The political relations between the Ottoman Porte and the Barbary States are of a very anomalous character. Their occasional obedience to the commands of the Sultan, accompanied with the irregular payment of tribute, does not prevent them from being considered by the Christian powers of Europe and America as independent States, with whom the international relations of war and peace are maintained, on the same footing as with other Mohammedan sovereignties. During [58] the Middle Age, and especially in the time of the Crusades, they were considered as pirates:

Relations
between the
Ottoman
Porte and
the Barbary
States.

‘Bugia ed Algieri, infami nidi di corsari,’

as Tasso calls them. But they have long since acquired the character of lawful powers, possessing all those attributes which distinguish a lawful State from a mere association of robbers.^(b) ‘The Algerines, Tripolitans, Tunisians, and those of Salee,’ says Bynkershoek, ‘are not pirates, but regular organized societies, who have a fixed territory and an established government, with whom we are alternately at peace and at war, as with other nations, and who, therefore, are entitled to the same rights as other independent States. The European sovereigns often enter into treaties with them, and the States-General have done it in several instances. Cicero defines a regular enemy to be: *Qui⁽ⁱ⁾ haberet rempublicam, curiam, ærarium, consensum et concordiam civium, rationem aliquam, si res ita⁽ⁱⁱ⁾ tulisset, pacis et fœderis.*⁽ⁱⁱⁱ⁾ (Philip, p. iv. c. 14.^(iv)) All these things are to be found among the barbarians of Africa; for they pay the same regard to treaties of peace and alliance that other nations do, who generally attend more to their convenience than to their engagements. And if they should not observe the faith of treaties *with the most scrupulous respect*, it cannot be well required of them; for it would be required in vain of other sovereigns. Nay, if they should even act with more injustice than other nations do, they should not, on that account, as *Huberus* very properly observes, (De Jure Civitat. l. iii. sect. 4, c. 5, n. ult.) lose the rights and privileges of sovereign States.’^(c)

§ 38. The political relation of the Indian nations on this continent towards the United States, is that of semi-sovereign States, under the exclusive protectorate of another power. Some of these savage tribes

(a) Ward’s Hist. of the Law of Nations, ii. 69.

(b) Sir L. Jenkins’s Works,^(v) ii. 791. Robinson’s Adm. Rep. iv. 5, The Helena.

(c) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. xvii.

[ⁱ For Qui read . . . qui.]—G.G.W.

[ⁱⁱ For res ita read ita res.]—G.G.W.

[ⁱⁱⁱ For et fœderis read, et fœderis. . .]—G.G.W.

[^{iv} For Philip, p. iv. c. 14 read Philippica quarta, c. 6.]—G.G.W.

[^v For Works read Life.]—G.G.W.

have totally extinguished their national fire, and submitted themselves to the laws of the States within whose territorial limits they reside; others have acknowledged, by treaty, that they hold their national existence at the will of the State; others retain a limited sovereignty, and the absolute proprietorship of the soil. The latter is the case with the tribes to the west of Georgia.^(a)

[59] Thus the Supreme Court of the United States determined, in 1831, that, though the Cherokee nation of Indians, dwelling within the jurisdictional limits of Georgia, was not a 'foreign State' in the sense in which that term is used in the Constitution, nor entitled, as such, to proceed in that Court against the State of Georgia, yet the Cherokees constituted *a State*, or a distinct political society, capable of managing its own affairs and governing itself, and that they had uniformly been treated as such since the first settlement of the country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, and responsible in their political capacity. Their relation to the United States was nevertheless peculiar. They were a domestic dependent nation; their relation to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied, until that right should be extinguished by a voluntary cession to our government.^(b)

The same decision was repeated by the Supreme Court, in another case, in 1832. In this case, the Court declared that the British crown had never attempted, previous to the Revolution, to interfere with the national affairs of the Indians, further than to keep out the agents of foreign powers, who might seduce them into foreign alliances. The British Government purchased the alliance and dependence of the Indian nations by subsidies, and purchased their lands, when they were willing to sell, at the price they were willing to take, but it never coerced a surrender of them. The British crown considered them as nations, competent to maintain the relations of peace and war, and of governing themselves under its protection. The United States, who succeeded to the rights of the British crown, in respect to the Indians, did the same, and no more; and the protection stipulated to be afforded to the Indians, and claimed by them, was understood by all parties as only binding the Indians to the United States as dependent allies. A weak power does not surrender its independence and right to self-government by associating with a stronger and taking its protection. This was the settled doctrine of the Law of Nations; and the Supreme Court therefore concluded and adjudged, that the Cherokee nation was a distinct community, occupying its own territory, with boundaries [60] accurately described, within which the laws of Georgia

(a) Cranch's Rep. vi. 146, *Fletcher v. Peck*.

(b) Peters's Rep. v. 1, *the Cherokee Nation v. The State of Georgia*.

could not rightfully have any force, and into which the citizens of that State had no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.^(c)²⁴

§ 39. States may be either single, or may be united together under a common sovereign prince, or by a federal compact.

§ 40. If this union under a common sovereign is not an incorporate union, that is to say, if it is only *personal* in the reigning sovereign; or even if it is *real*, yet if the different component parts are united with a perfect equality of rights, the sovereignty of each State remains unimpaired.^(a)

Single
or united
States.
Personal
union under
the same
sovereign.

Thus, the kingdom of Hanover was formerly held by the king of [61] the United Kingdom of Great Britain and Ireland, separately from his insular dominions. Hanover and the United Kingdom were subject to the same prince, without any dependence on each other, both kingdoms retaining their respective national rights of sovereignty. It is thus that the king of Prussia is also sovereign prince of Neufchatel⁽ⁱ⁾, one of the Swiss Cantons; which does not, on that account, cease to maintain its relations with the Confederation, nor is it united with the Prussian monarchy.²⁵

So, also, the kingdoms of Sweden and Norway are united under

(c) Kent's Comment. on American Law, iii. 383.

[²⁴ It is important to notice the underlying fact, that the title to all the lands occupied by the Indian tribes, beyond the limits of the thirteen original States, is in the United States. The republic acquired it by the treaties of peace with Great Britain, by cessions from France and Spain, and by relinquishments made by the several States. The Indian tribes have only a right of occupancy. Their possession was held to be of so nomadic and uncivilized a character as to amount to no more than a kind of servitude or lien upon the land, chiefly for fishing, and hunting; the absolute title being in the republic. Whenever the republic has bought out an Indian tribe, and induced it to remove from a section of country, the act has always been called an 'extinguishment of the Indian title' upon the lands of the United States. This title of occupancy the tribes are not permitted to convey to any other than the United States. The United States protect the Indians in their possession, and make treaties with the tribes; at the same time, the government makes laws, which have effect within the occupancy of the tribes, to punish Indians as well as white persons for crimes, and to decide questions between whites, or between Indians and whites, and provide for the education of the tribal Indians in agriculture and the arts of life, and plain school-teaching, at the public expense. A tribe is not a 'foreign State,' within the meaning of the Constitution, for the purpose of suing in the Federal courts. Where a tribe holds a district within a State, and is recognized by the United States as having tribal authority and jurisdiction, the State cannot make penal and criminal laws to arrest Indians, remove them, and try them for crimes in the State courts. The Indian tribes are not under State jurisdiction where they hold lands within the State, as a tribe, under treaties and laws of the republic; and their relations with the republic are *sui generis*, having been shaped and modified by time and events. Worcester v. Georgia, Peters, vi. 515; Mitchell v. United States, Peters, ix. 711; Lattimer v. Poteet, Peters, xiv. 4; United States v. Fernandez, Peters, x. 303; United States v. Rogers, How. iv. 467; Cherokee Nation v. Georgia, Peters, v. 1; Brightly's Digest of United States Laws, title 'Indians.']—D.

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 9, §§ 8, 9. Klüber, Droit des Gens Moderne de l'Europe, Part I. cap. 1, § 27. Heffter, Das europäische Völkerrecht, § 20.

[²⁵ The independence of Neufchatel⁽ⁱ⁾ was recognized by Prussia in 1857, and it is now simply a canton of the Swiss Confederation.]—D.

[1 For Neufchatel read Neuchâtel.]—G.W.W.

one crowned head, each kingdom retaining its separate constitution, laws, and civil administration, the external sovereignty of each being represented by the king.

*Real union
under the
same sove-
reign.*

§ 41. The union of the different States composing the Austrian monarchy is a *real* union. The hereditary dominions of the House of Austria, the kingdoms of Hungary and Bohemia, the Lombardo-Venetian kingdom, and other States, are all indissolubly united under the same sceptre, but with distinct fundamental laws, and other political institutions.

It appears to be an intelligible distinction between such a union as that of the Austrian States, and all other unions which are merely *personal* under the same crowned head, that, in the case of a *real* union, though the separate sovereignty of each State may still subsist internally, in respect to its co-ordinate States, and in respect to the imperial crown, yet the sovereignty of each is merged in the general sovereignty of the empire, as to their international relations with foreign powers. The political unity of the States which compose the Austrian Empire forms what the German publicists call a community of States (*Gesammtstaat*); a community which reposes on historical antecedents. It is connected with the natural progress of things, in the same way as the empire was formed, by an agglomeration of various nationalities, which defended, as long as possible, their ancient constitutions, and only yielded, finally, to the overwhelming influence of superior force.²⁶

^[26] By the treaty of Zurich, of 1859, carrying out the preliminaries of Villafranca, Lombardy, with the exception of the fortresses of Mantua and Peschiera, was transferred by Austria to France, and by France to Sardinia, and is now part of the kingdom of Italy. Venetia remains under Austrian control.

The relations of Hungary with Austria have been in a state of change since the rebellion of 1848. On the suppression of the rebellion, the emperor made the attempt to merge Hungary in the Austrian Empire, and assumed and exercised absolute power over it until 1860, when he issued his diploma of 20 October, 1860, and his patent of 27 February, 1861. By the diploma and patent, he proposed a plan of government in this form: There should be an Imperial diet, or Reichsrath, for the entire empire, and separate diets for the component parts of the empire. The supreme legislative power was to be in the emperor; but the Reichsrath was to have a consultative vote, and its concurrence was necessary for certain exercises of authority, as the laying of taxes, the raising of troops, and the imposition of duties,—the usual guaranties of constitutional government. The ancient constitution of Hungary was to be restored, except that the Diet was to part with its jurisdiction over subjects placed in the class of imperial powers, and conceded to the emperor and the Reichsrath. Under the patent, the Hungarian Diet assembled; but Hungary refused to send deputies to the Reichsrath, so that the latter never had an existence in fact. An Austrian Diet held its sessions at Vienna, having jurisdiction only over Austria proper and some of the dependencies. The Hungarian Diet insisted on retaining to itself two powers,—the laying of taxes, and the raising of troops. By a steady adherence to the exercise of these functions, and a refusal to take part in the Reichsrath on the terms of October, 1860, Hungary at length brought the emperor to suggest the possibility of further concessions; the results of the Italian war, and the fact of an empty treasury and impaired credit, and the increasing assumptions of Prussia in the affairs of the German Confederation, having forced upon him some decided change of system. On the 14th of December, 1865, the emperor opened the Hungarian Diet in person, at Pesth, and offered to be crowned King of Hungary, and to sustain their ancient constitution; submitting to them again the

[62] § 42. An *incorporate* union is such as that which subsists between Scotland and England, and between Great Britain and Ireland; forming out of the three kingdoms an empire, united under one crown and one legislature, although each may have distinct laws and a separate administration. The sovereignty, internal and external, of each original kingdom is completely merged in the united kingdom, thus formed by their successive unions. Incorporate union.

[63] § 43. The union established by the Congress of Vienna, between the empire of Russia and the kingdom of Poland, is of a more anomalous character. By the final act of the congress, the Duchy of Warsaw, with the exception of the provinces and districts otherwise disposed of, was re-united to the Russian Empire; and it was stipulated that it should be irrevocably connected with that empire by its constitution, to be possessed by His Majesty the Emperor of all the Russias, his heirs and successors in perpetuity, with the title of King of Poland; His Majesty reserving the right to give to this State, enjoying a distinct administration, such interior extension as he should judge proper; and that the Poles, subject respectively to Russia, Austria, and Prussia, should obtain a representation and national institutions, regulated according to that mode of political existence which each government, to whom they belong, should think useful and proper to grant. (a) Union between Russia and Poland.

In pursuance of these stipulations, the Emperor Alexander granted a constitutional charter to the kingdom of Poland, on 15th (27th) November, 1815. By the provisions of this charter, the kingdom of Charter accorded by the Emperor Alexander to the kingdom of Poland, in 1815.

diploma of October, 1860, to which he admitted the possibility of some amendments. The Hungarian Diet was to be composed of Hungary and its dependencies, Croatia and Transylvania; while the other Diet was to represent Austria and Bohemia, and the German provinces of the empire. The point of difference was chiefly upon the raising of troops and taxes. Hungary was willing to concede to the Reichsrath the subjects of duties on exports and imports, foreign international relations, the declaration of war, and the making of peace; as well as the post, public railroads, education, ecclesiastical affairs, and the currency. It was plain, however, that, if Hungary could determine what taxes she should lay, and what troops she should raise, she had an effective veto on the central power. At the Diet of 1866, an address to the throne (the throne of Hungary) was adopted, in general terms expressing readiness to come into the plan of the central government, 'if the political and administrative autonomy of Hungary be maintained intact.' It accepts the Pragmatic Sanction, but rejects the diploma of October, 1860, as it then stood. So, the adjustment remains, at this time, unsettled.]—D.

(a) 'Le Duché de Varsovie, à l'exception des provinces et districts, dont il a été autrement disposé dans les articles suivans, est réuni à l'Empire de Russie. Il y sera lié irrévocablement par sa Constitution, pour être possédé par S.M. l'Empereur de toutes les Russies, ses héritiers et ses successeurs à perpétuité. Sa Majesté Impériale se réserve de donner à cet état, jouissant d'une administration distincte, l'extension intérieure qu'elle jugera convenable. Elle prendra avec ses autres titres celui de Czar, Roi de Pologne, conformément au protocole usité et consacré par⁽¹⁾ les titres attachés à ses autres possessions.

'Les Polonais, sujets respectifs de la Russie, de l'Autriche, et de la Prusse, obtiendront une représentation et des institutions nationales, réglées d'après la mode d'existence politique que chacun des Gouvernemens auxquels ils appartiennent jugera utile et convenable de leur accorder.'—*Art. 1.*

[¹ For par read pour.]—G.G.W.

Poland was declared to be united to the Russian Empire by its constitution; the sovereign authority in Poland was to be exercised only in conformity to it; the coronation of the King of Poland was to take place in the Polish capital, where he was bound to take an oath to observe the charter. The Polish nation was to have a perpetual representation, composed of the king and the two chambers forming the Diet; in which body the legislative power was to be vested, including that of taxation. A distinct Polish national army and coinage, and distinct military orders, were to be preserved in the kingdom.

Manifesto of
the Emperor
Nicholas,
1832.

[64] In consequence of the revolution and reconquest of Poland by Russia, a manifesto was issued by the Emperor Nicholas, on the 14th (26th) of February, 1832, by which the kingdom of Poland was declared to be perpetually united (*réuni*) to the Russian Empire, and to form an integral part thereof; the coronation of the emperors of Russia and kings of Poland hereafter to take place at Moscow, by one and the same act; the Diet to be abolished, and the army of the empire and of the kingdom to form one army, without distinction of Russian or Polish troops; Poland to be separately administered by a Governor-General and Council of Administration, appointed by the Emperor, and to preserve its civil and criminal code, subject to alteration and revision by laws and ordinances prepared in the Polish Council of State, and subsequently examined and confirmed in the Section of the Council of State of the Russian Empire, called *The Section for the Affairs of Poland*; consultative Provincial States to be established in the different Polish provinces, to deliberate upon such affairs concerning the general interest of the kingdom of Poland as might be submitted to their consideration; the Assemblies of the Nobles, Communal Assemblies, and Council of the Waiwodes to be continued as formerly. Great Britain and France protested against this measure of the Russian government, as an infraction of the spirit if not of the letter of the treaties of Vienna.^(b)²⁷

(b) Wheaton's Hist. of the Law of Nations, 434.

[²⁷ In 1861, the Diet of Poland was re-established, and the emperor was to act as King of Poland, in matters relating to that kingdom. A new revolution in Poland, in 1862, growing out of the revival of a stringent system of conscription enforced there, was followed by a convention between Russia and Prussia; in which Prussia agreed to drive back from her borders all Polish insurgents, and to permit the entry of Russian forces into Prussia in pursuit of insurgents. This convention (known as the Convention of St. Petersburg) was strongly objected to by France and England, but not effectually. They proposed, on the 17th June, 1863, six points of arrangement with Poland, looking to the restoring of Poland to its condition under the treaty of Vienna. These were refused by Russia; and France and England, being left to the alternative of war, abandoned any further attempt to aid Poland; and the insurrection was suppressed by the exercise of the most extreme measures. It can no longer be pretended that Poland is held by Russia under the treaty of Vienna, whatever be the right of the case, or the forms kept up. Russia, in fact, holds her Polish territories by the sword, and in defiance of the remonstrances of France and England respecting breaches of the treaty; and Austria and Prussia are either neutral, or abettors of Russia, having strong interests in common; and the relations of Russian Poland to Russia, not yet fully adjusted, may be said to

[65] § 44. Sovereign States permanently united together by a federal compact, either form a *system of confederated States*, (properly so called,) or a *supreme federal government*, which has been sometimes called a *compositive State*.^(a)

Federal union.

§ 45. In the first case, the several States are connected together by a compact, which does not essentially differ from an ordinary treaty of equal alliance. Consequently the internal sovereignty of each member of the union remains unimpaired; the resolutions of the federal body being enforced, not as laws directly binding on the private individual subjects, but through the agency of each separate government, adopting them, and giving them the force of law within its own jurisdiction. Hence it follows, that each confederated individual State, and the federal body for the affairs of common interest, may become, each in its appropriate sphere, the object of distinct diplomatic relations with other nations.

Confederated States, each retaining its own sovereignty.

§ 46. In the second case, the federal government created by the act of union is sovereign and supreme, within the sphere of the powers granted to it by that act; and the government acts not only upon the States which are members of the Confederation, but directly on the citizens. The sovereignty, both internal and external, of each several State is impaired by the powers thus granted to the federal government, and the limitations thus imposed on the several State governments. The compositive State, which results from this league, is alone a sovereign power.

Supreme federal government or compositive State.

§ 47. Germany, as it has been constituted under the name of the Germanic Confederation, presents the example of a system of sovereign States, united by an equal and permanent Confederation. All the sovereign princes and free cities of Germany, including the Emperor of Austria and the King of Prussia, in respect to their possessions which formerly belonged to the Germanic Empire, the King of Denmark for the Duchy of Holstein, and the King of the Netherlands for the Grand Duchy of Luxembourg, are united in a perpetual league, under the name of the Germanic Confederation, established by the Federal [66] Act of 1815, and completed and developed by several subsequent decrees.

Germanic Confederation.

The object of this union is declared to be the preservation of the external and internal security of Germany, the independence and inviolability of the confederated States. All the members of the Confederation, as such, are entitled to equal rights. New States

depend on the will of the Czar. Annual Register, 1863, pp. 281-292. Appendix to ditto, 330-351. Ditto, 1864, pp. 133-207.⁽¹⁾ Le Nord, March 17, 24, 1863.]—D.

(a) These two species of federal compacts are very appropriately expressed in the German language, by the respective terms of *Staatenbund* and *Bundesstaat*.

[¹ For 133-207 read 113, 207.]—G.G.W.

may be admitted into the union by the unanimous consent of the members.(a)

The affairs of the union are confided to a Federative Diet, which sits at Frankfort-on-the-Main, in which the respective States are represented by their ministers, and are entitled to the following votes, in what is called the *Ordinary Assembly* of the Diet:—

	Votes.
Austria	1
Prussia	1
Bavaria	1
Saxony	1
Hanover	1
Wurtemberg	1
Baden	1
Electoral Hesse	1
The Grand Duchy of Hesse	1
Denmark (for Holstein)	1
The Netherlands (for Luxembourg)	1
The Grand Ducal and Ducal Houses of Saxony	1
Brunswick and Nassau	1
Mecklenburg-Schwerin and Strelitz	1
Oldenburg, ⁽ⁱ⁾ Anhalt, and Schwartzburg	1
Hohenzollern, Lichtenstein, Reuss, Schaumburg, ⁽ⁱⁱ⁾ Lippe, ⁽ⁱⁱⁱ⁾ Waldeck, and Hesse Homburg ^(iv)	1
The Free Cities of Lubeck, Frankfort, Bremen, and Hamburg	1
Total	17

Austria presides in the Diet, but each State has a right to propose any measure for deliberation.

The Diet is formed into what is called a *General Assembly*, (*Plenum*,) for the decision of certain specific questions. The votes *in pleno* are distributed as follows:—

	Votes.
[67] Austria	4
Prussia	4
Saxony	4
Bavaria	4
Hanover	4
Wurtemberg	4
Baden	3
Electoral Hesse	3
The Grand Duchy of Hesse	3
Holstein	3
Luxemburg	3
Brunswick	2
Mecklenburg-Schwerin	2

(a) Acte final du Congrès de Vienne, arts. 53, 54, 55. Deutsche Bundesacte, vom 8 Juni, 1815, art. 1. Wiener Schlussacte, vom 15 Mai, 1820, arts. 1, 6.

[¹ For Oldenburg read Holstein-Oldenburg.]—G.G.W.

[ⁱⁱ For Schaumburg read Schaumburg-Lippe.]—G.G.W.

[ⁱⁱⁱ For Lippe, read Lippe and.]—G.G.W.

[^{iv} Omit and Hesse Homburg.]—G.G.W.

	Votes.
Nassau	2
Saxe Weimar	1
Gotha	1
Coburg	1
Meiningen	1
Hildburghausen	1
Mecklenburg-Strelitz	1
Oldenburg ⁽ⁱ⁾	1
Anhalt-Dessau	1
Anhalt-Bernburg	1
Anhalt-Coethen	1
Schwartzburg-Sondershausen	1
Schwartzburg-Rudolstadt	1
Hohenzollern-Hechingen	1
Lichtenstein	1
Hohenzollern-Sigmaringen	1
Waldeck	1
Reuss (elder branch)	1
Reuss (younger branch)	1
Schaumburg-Lippe	1
Lippe	1
Hesse-Homburg ⁽ⁱⁱ⁾	1
The Free City of Lubeck	1
Frankfort	1
Bremen	1
Hamburg	1
Total	70 ⁽ⁱⁱⁱ⁾

[68] Every question to be submitted to the general assembly of the Diet is first discussed in the ordinary assembly, where it is decided by a majority of votes. But, in the general assembly, (*in pleno*), two thirds of all the votes are necessary to a decision. The ordinary assembly determines what subjects are to be submitted to the general assembly. But all questions concerning the adoption or alteration of the fundamental laws of the Confederation, or organic regulations establishing permanent institutions, as means of carrying into effect the declared objects of the union, or the admission of new members, or concerning the affairs of religion, must be submitted to the general assembly; and, in all these cases, absolute unanimity is necessary to a final decision.^(b)

The Diet has power to establish fundamental laws for the Confederation, and organic regulations as to its foreign, military, and internal relations.^(c)

All the States guarantee to each other the possession of their respective dominions within the union, and engage to defend, not only entire Germany, but each individual State, in case of attack. When

(b) Acte final, art. 58. Wiener Schlussacte, arts. 12-15.

(c) Acte final, art. 62.

[¹ For Oldenburg read Holstein-Oldenburg.]—G.G.W.

[ⁱⁱ Hesse-Homburg not included.]—G.G.W.

[ⁱⁱⁱ For 70 read 69.]—G.G.W.

war is declared by the Confederation, no State can negotiate separately with the enemy, nor conclude peace or an armistice, without the consent of the rest. Each member of the Confederation may contract alliances with other foreign States, provided they are not directed against the security of the Confederation, or the individual States of which it is composed. No State can make war upon another member of the union, but all the States are bound to submit their differences to the decision of the Diet. This body is to endeavor to settle them by mediation; and if successful, and a juridical sentence becomes necessary, resort is to be had to an austrägal proceeding, (*Austrägal-Instanz*,) to which the litigating parties are bound to submit without appeal.(d)

Each country of the Confederation is entitled to a local constitution of States.(e) The Diet may guarantee the constitution established by any particular State, upon its application; and thereby acquire the right of settling the differences which may [69] arise respecting its interpretation or execution, either by mediation or judicial arbitration, unless such constitution shall have provided other means of determining controversies of this nature.(f)

In case of rebellion or insurrection, or imminent danger thereof in one or more States of the Confederation, the Diet may interfere to suppress such insurrection or rebellion, as threatening the general safety of the Confederation. And it may in like manner interfere on the application of any one State; or, if the local government is prevented by the insurgents from making such application, upon the notoriety of the fact of the existence of such insurrection, or imminent danger thereof, to suppress the same by the common force of the Confederation.(g)

In case of the denial or unreasonable delay of justice by any State to its subjects, or others, the aggrieved party may invoke the mediation of the Diet; and if the suit between private individuals involves a question respecting the conflicting rights and obligations of different members of the union, and it cannot be amicably arranged by compromise, the Diet may submit the controversy to the decision of an austrägal tribunal.(h)

The decrees of the Diet are executed by the local governments of the particular States of the Confederation, on application to them by the Diet for that purpose, excepting in those cases where the Diet interferes to suppress an insurrection or rebellion in one or more of the States; and even in these instances, the execution is to be enforced,

(d) Acte final, art. 63.

(e) 'In allen Bundesstaaten wird eine landeständische^[1] Verfassung stattfinden.' Bundesacte, art. 13.

(f) Wiener Schlussacte, art. 60

(g) Ib., arts. 25-28.

(h) Ib., arts. 29, 30.

[1 For landeständische read landesständische.]—G.G.W.

so far as practicable, in concert with the local government against whose subjects it is directed.(i)

The subjects of each member of the union have the right of acquiring and holding real property in any other State of the Confederation; of migrating from one State to another; of entering into the military or civil service of any one of the confederated States, subject to the paramount claim of their own native sovereign; and of exemption from every *droit de détraction*, or other similar tax, on removing their effects from one State to another, unless where particular reciprocal compacts have stipulated to the contrary. The Diet has power to establish uniform laws relating to the freedom of the press, and to secure to authors the copyright of their works throughout the Confederation.(j)

[70] The Diet has also power to regulate the commercial intercourse between the different States, and the free navigation of the rivers belonging to the Confederation, as secured by the treaty of Vienna.(k)²⁸

The different Christian sects throughout the Confederation are entitled to an equality of civil and political rights; and the Diet is empowered to take into consideration the means of ameliorating the civil condition of the Jews, and of securing to them in all the States of the Confederation the full enjoyment of civil rights, upon condition that they submit themselves to all the obligations of other citizens. In the mean time, the privileges granted to them by any particular State are to be maintained.(l)

§ 48. Notwithstanding the great mass of powers thus given to the Diet, and the numerous restraints imposed upon the exercise of internal sovereignty, by the individual States of which the union is composed, it does not appear that the Germanic Confederation can be distinguished, in this respect, from an ordinary equal alliance between independent sovereigns, except by its permanence, and by the greater number and complication of the objects it is intended to embrace. In respect to their internal sovereignty, the several States of the Confederation do not form, by their union, one compositive State, nor are they subject to a common sovereign. Though what are called the fundamental *laws* of the Confederation are framed by the Diet, which has also power to make organic regulations respecting its federal relations; these regulations are not, in general, enforced as laws directly binding on the private individual subjects, but only through the agency of each separate government adopting them, and giving them the force of laws within its own local jurisdiction. If there be cases

Of the internal sovereignty of the States of the Germanic Confederation.

(i) *Ib.*, art. 32.

(k) Bundesacte, art. 19. Acte final, arts. 108-117.

(j) Bundesacte, art. 18.

(l) Bundesacte, art. 16.

[²⁸ The duties as to commerce and free navigation have not been performed by the Diet, but by a Zollverein, of which Prussia and nearly all the German States are members, and in which Austria is indirectly included by the operation of a treaty with Prussia.]—D.

where the Diet may rightfully enforce its own resolutions directly against the individual subjects, or the body of subjects within any particular State of the Confederation, without the agency of the local governments, (and there appear to be some such cases,) then these cases, when they occur, form an exception to the general character of the union, which then so far becomes a [71] compositive State, or supreme federal government. All the members of the Confederation, as such, are equal in rights; and the occasional obedience of the Diet, and through it of the several States, to the commands of the two great preponderating members of the Confederation, Austria and Prussia, or even the habitual influence exercised by them over its councils, and over the councils of its several States, does not, in legal contemplation, impair their internal sovereignty, or change the legal character of their union.

Of the external sovereignty of these States.

§ 49. In respect to the exercise by the confederated States of their external sovereignty, we have already seen that the power of contracting alliances with other States, foreign to the Confederation, is expressly reserved to all the confederated States, with the proviso that such alliances are not directed against the security of the Confederation itself, or that of the several States of which it is composed. Each State also retains its rights of legation, both with respect to foreign powers and to its co-States.^(a) Although the diplomatic relations of the Confederation with the five great European powers, parties to the Final Act of the Congress of Vienna, 1815, are habitually maintained by permanent legations from those powers to the Diet at Frankfort, yet the Confederation itself is not habitually represented by public ministers at the courts of these, or any other foreign powers; whilst each confederated State habitually sends to, and receives such minister from other sovereign States, both within and without the Confederation. It is only on extraordinary occasions, such, for example, as the case of a negotiation for the conclusion of a peace or armistice, that the Diet appoints plenipotentiaries to treat with foreign powers.^(b)

According to the original plan of confederation as proposed by Austria and Prussia, those States, *not having possessions out of Germany*, were to have been absolutely prohibited from making alliances or war with any power foreign to the Confederation, without the consent of the latter. But this proposition was subsequently modified by the insertion of the above 63d article of the Federal Act of 1815. And the limitations contained in that article upon the war-making and treaty-making powers, both of the Con[72]federation itself and of its several members, were more completely defined by the Final Act of 1820.^(c)

It results clearly from these provisions, that such of the con-

(a) Klüber, *Oeffentliches Recht des deutschen Bundes*, §§ 137-143.

(b) Klüber, §§ 148, 152 a. *Wiener Schlussacte*, § 49.

(c) Wheaton's *Hist. Law of Nations*, 447, 448, 457-460.

federated States, *as have possessions without the limits of the Confederation*, retain the authority of declaring and carrying on war against any power foreign to the Confederation, independently of the Confederation itself, which remains neutral in such a war, unless the Diet shall recognize the existence of a danger threatening the federal territory. The sovereign members of the Confederation, having possessions without the limits thereof, are the Emperor of Austria, the King of Prussia, the King of the Netherlands, and the King of Denmark. Whenever, therefore, any one of these sovereigns undertakes a war in his character of a European power, the Confederation, whose relations and obligations are unaffected by such war, remains a stranger thereto; in other words, it remains neutral, even if the war be defensive on the part of the confederated sovereign as to his possessions without the Confederation, unless the Diet recognizes the existence of a danger threatening the federal territory.^(d)²⁹

It seems, also, to result from these provisions, taken in connection with the above-mentioned modification in the original plan of Confederation, that even those States *not having possessions without the limits of the Confederation*, retain the sovereign authority of [73] separately declaring and carrying on war, and of negotiating and making peace with any power foreign to the Confederation, excepting in the single case of a war declared by the Confederation itself; in which case, no State can negotiate with the enemy, nor conclude peace or an armistice, without the consent of the rest.

In other cases of disputes, arising between any State of the Confederation and foreign powers, and the former asks the intervention of the Diet, the Confederation may interfere as an ally, or as a mediator; may examine the respective complaints and pretensions of the contending parties. If the result of the investigation is, that the co-State is not in the right, the Diet will make the most serious representations

(d) Wiener Schlussacte, arts. 46, 47. Klüber, Oeffentliches Recht des teutschen Bundes. §§ 152 f.

[²⁹ During the Italian war of 1859, Austria invoked the 47th article of the Final Act, on the allegation that her territory within the Confederation was threatened by France and Sardinia. Prussia refused to consider that war as a matter affecting the Confederation, and gave official notice that she would not be bound by a decision of a majority of the Diet to that effect. At the same time, she agreed to the federal contingent being put upon a war footing. The more southern German powers favored the Austrian application; but the attitude of Prussia defeated it. Russia also remonstrated against any construction of the confederative union which carried it beyond a purely defensive combination. *Annuaire des deux Mondes*, 1859. *Annual Register*, 1859. The correspondence of 1859 shows that the construction of the articles relating to defence is not settled; that the action of the Confederation depends largely on either Prussia or Austria; and that the parties to the treaty of Vienna consider themselves entitled to a voice, to the extent of seeing that the Confederation adheres to its limits of duties, they having admitted it into the public law of Europe, and being interested in its action. The threat of coercion by Prussia on Saxony, in 1865, and the acquiescence of Austria, and the results of the Schleswig-Holstein war (*vide infra*), have combined to impair very much the guaranties of the Confederation.]—D.

to induce it to renounce its pretensions, will refuse its interference, and, in case of necessity, will take all proper means for the preservation of peace. If, on the contrary, the preliminary examination proves that the confederated State is in the right, the Diet will employ its good offices to obtain for it complete satisfaction and security.^(e)

The Germanic Confederation is a system of confederated States.

It follows, that not only the internal but the external sovereignty of the several States composing the Germanic Confederation, remains unimpaired, except so far as it may be affected by the express provisions of the fundamental laws authorizing the federal body to represent their external sovereignty. In other respects, the several confederated States remain independent of each other, and of all States foreign to the Confederation. Their union constitutes what the German public jurists call a *Staatenbund*, as contradistinguished from a *Bundesstaat*; that is to say, a supreme Federal Government.^(f)

Act of the Diet of 1832.

§ 50. Very important modifications were introduced into the Germanic Constitution, by an act of the Diet of the 28th of June, 1832. By the 1st article of this act it is declared, that, whereas, according to the 57th article of the Final Act of the [74] Congress of Vienna, the powers of the State ought to remain in the hands of its chief, and the sovereign ought not to be bound by the local constitution to require the co-operation of the legislative Chambers, except as to the exercise of certain specified rights; the sovereigns of Germany, as members of the Confederation, have not only the right of rejecting the petitions of the Chambers, contrary to this principle, but the object of the Confederation makes it their duty to reject such petitions.

ART. 2. Since according to the spirit of the said 57th article of the Final Act, and its inductions, as expressed in the 58th article, the Chambers cannot refuse to any German sovereign the necessary means of fulfilling his federal obligations, and those imposed by the local constitution; the cases in which the Chambers endeavor to make their consent to the taxes necessary for these purposes depend upon the

(e) Wiener Schlussacte, arts. 35-49. Klüber, § 462.

(f) Klüber, §§ 103 a, 176, 248, 460, 461, 462. Heffter, Das europäische Völkerrecht, § 21.

The Treaty of Paris, 1814, art. 6, declares: 'Les états de l'Allemagne seront indépendans et unis par un lien fédératif.'

The Final Act of the Congress of Vienna, 1815, art. 54, declares: 'Le but de cette Confédération est le maintien de la sûreté extérieure et intérieure de l'Allemagne, de l'indépendance et de l'inviolabilité de ses⁽¹⁾ états confédérés.'

And the *Schlussacte*, of 1820, declares:—

ART. 1. The Germanic Confederation is an international union of the sovereign Princes and Free Cities of Germany, formed for the maintenance of the independence and inviolability of the confederated States, as well as for the internal and external security of Germany.

ART. 2. In respect to its internal relations, this Confederation forms a body of States independent between themselves, and bound to each other by rights and duties reciprocally stipulated. In respect to its external relations, it forms a collective power established on the principle of political union.

[¹ For de ses *read* des.]—G.G.W.

assent of the sovereign to their propositions upon any other subject, are to be classed among those cases to which are to be applied the 25th and 26th articles of the Final Act, relating to resistance of the subjects against the government.

ART. 3. The interior legislation of the States belonging to the Germanic Confederation, cannot prejudice the objects of the Confederation, as expressed in the 2d article of the original act of confederation, and in the 1st article of the Final Act; nor can this legislation obstruct in any manner the accomplishment of the federal obligations of the State, and especially the payment of the taxes necessary to fulfil them.

ART. 4. In order to maintain the rights and dignity of the Confederation, and of the assembly representing it, against usurpations of every kind, and, at the same time, to facilitate to the States which are members of the Confederation the maintenance of the constitutional relations between the local governments and the legislative Chambers, there shall be appointed by the Diet, in the first instance, for the term of six years, a commission charged with the supervision of the deliberations of the Chambers, and with directing their attention to the propositions and resolutions which may be found in opposition to the federal obligations, or to the [75] rights of sovereignty, guarantied by the compacts of the Confederation. This commission is to report to the Diet, which, if it finds the matter proper for further consideration, will put itself in relation with the local government concerned. After the lapse of six years, a new arrangement is to be made for the prolongation of the commission.

ART. 5. Since according to the 59th article of the Final Act, in those States where the publication of the deliberations of the Chambers is secured by the constitution, the free expression of opinion, either in the deliberations themselves, or in their publication through the medium of the press, cannot be so extended as to endanger the tranquillity of the State itself, or of the Confederation in general, all the governments belonging to it mutually bind themselves, as they are already bound by their federal relations, to adopt and maintain such measures as may be necessary to prevent and punish every attack against the Confederation in the local Chambers.

ART. 6. Since the Diet is already authorized by the 17th article of the Final Act, for the maintenance of the true meaning of the original act of confederation, to give its provisions such an interpretation as may be consistent with its object, in case doubts should arise in this respect, it is understood that the Confederation has the exclusive right of interpreting, so as to produce their legal effect, the original act of the Confederation and the Final Act, which right it exercises by its constitutional organ, the Diet.(a)

(a) Wheaton's Hist. Law of Nations, 460-486.

Act of the
Diet of 1834.

§ 51. Further modifications of the federal constitution were introduced by the act of the Diet of the 30th of October, 1834, in consequence of the diplomatic conferences held at Vienna in the same year, by the representatives of the different States of Germany.

By the 1st article of this last-mentioned act, it is provided that, in case of differences arising between the government of any State and the legislative Chambers, either respecting the interpretation of the local constitution, or upon the limits of the co-operation allowed to the Chambers, in carrying into effect certain determinate rights of the sovereign, and especially in case of the refusal of the necessary supplies for the support of government, conformably to the constitution and the federal obligations of the State, after every legal and constitutional means of conciliation have [76] been exhausted, the differences shall be decided by a federal tribunal of arbitrators, appointed in the following manner:—

2. The representatives, each holding one of the seventeen votes in the ordinary assembly of the Diet, shall nominate, once in every three years, within the States represented by them, two persons distinguished by their reputation and length of service in the judicial and administrative service. The vacancies which may occur, during the said term of three years, in the tribunal of arbitrators thus constituted, shall be in like manner supplied as often as they may occur.

3. Whenever the case mentioned in the first article arises, and it becomes necessary to resort to a decision by this tribunal, there shall be chosen from among the thirty-four, six judges arbitrators, of whom three are to be selected by the government, and three by the Chambers. This number may be reduced to two, or increased to eight, by the consent of the parties: and in case of the neglect of either to name judges they may be appointed by the Diet.

4. The arbitrators thus designated shall elect an additional arbiter as an umpire, and in case of an equal division of votes, the umpire shall be appointed by the Diet.

5. The documents respecting the matter in dispute shall be transmitted to the umpire, by whom they shall be referred to two of the judges arbitrators to report upon the same, the one to be selected from among those chosen by the government, the other from among those chosen by the Chambers.

6. The judges arbitrators, including the umpire, shall then meet at a place designated by the parties, or, in case of disagreement, by the Diet, and decide by a majority of voices the matter in controversy according to their conscientious conviction.

7. In case they require further elucidations before proceeding to a decision, they shall apply to the Diet, by whom the same shall be furnished.

8. Unless in case of unavoidable delay under the circumstances stated in the preceding article, the decision shall be pronounced within the space of four months at farthest from the nomination of the umpire, and be transmitted to the Diet, in order to be communicated to the government of the State interested.

9. The sentence of the judges arbitrators shall have the effect of an austrègal judgment, and shall be carried into execution in the manner prescribed by the ordinances of the Confederation.

[77] In the case of disputes more particularly relating to the financial budget, the effect of the arbitration extends to the period of time for which the same may have been voted.

10. The costs and expenses of the arbitration are to be exclusively borne by the State interested, and, in case of disputes respecting their payment, they shall be levied by a decree of the Diet.

11. The same tribunal shall decide upon the differences and disputes which may arise, in the free towns of the Confederation, between the Senate and the authorities established by the burghers in virtue of their local constitutions.

12. The different members of the Confederation may resort to the same tribunal of arbitration to determine the controversies arising between them; and whenever the consent of the States respectively interested is given for that purpose, the Diet shall take the necessary measures to organize the tribunal according to the preceding articles.(b)³⁰

(b) For further details respecting the Germanic Constitution, see Wheaton's History of the Law of Nations, 455, *et seq.*

[³⁰ *The German Confederation.*—During the revolutionary troubles of 1848, an attempt was made to create a political union of the entire German nationality. A parliament met at Frankfort in May, 1848, with the approbation of the Diet of the confederacy. The parliament proposed a constitution creating a German empire, with an hereditary emperor, a diet of two chambers, a constitutional government and imperial judicature, with full freedom of speech and press. Austria, Wurtemberg, Bavaria, and Hanover having refused to join the empire, the King of Prussia, to whom the imperial throne had been offered, refused it; and the attempt fell through. Efforts were afterwards made by Austria and Prussia separately to construct some form of a united German government, but they all failed; and, in May, 1851, they fell back upon the old German confederacy of 1815. (Annual Register, 1848, p. 362; 1849, pp. 347, 364; 1850, pp. 313, 320; 1851, p. 276.) The war of 1864, for the duchies, found Denmark unsupported by any European power; and, after a short, brave struggle with the combined Austrian, Prussian, and German-Confederate armies and navy, Denmark sent a plenipotentiary directly to Vienna to settle terms of peace with Austria and Prussia, without the intervention of any of the other great powers. The preliminaries of peace were signed at Vienna, on the 1st August, 1864. The terms were as follows: I. The King of Denmark renounced his rights to the duchies of Schleswig, Holstein, and Lauenburg, in favor of the King of Prussia and Emperor of Austria; engaging to respect such arrangements as their Majesties might make respecting the duchies. II. The boundaries are settled by including in Schleswig the islands belonging to that duchy, and the Jutland possessions lying south of the southern line of Ribe, which includes several islands, as Amrom, parts of Föhr, Sylt, &c.; and by Denmark retaining small portions of Schleswig, to rectify the line. III. The ceded duchies bear their share of the debts of the kingdom of Denmark, contracted for the general account. IV. An armistice was established upon the principle of *uti possidetis*. V. A treaty of peace is to be made. By the

United
States of
America.

[78] § 52. The Constitution of the United States of America is of a very different nature from that of the Germanic Confederation. It is not merely a league of sovereign States, for their common defence against external violence, but a supreme federal government, or composite State, acting not only upon the sovereign members of the Union, but directly upon all its citizens in their individual and corporate capacities. It was established, as the Constitution expressly declares, by 'the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to them and their posterity.'⁽¹⁾ This Constitution, and the laws made in pursuance thereof, and treaties made under the authority of the United States, are declared to be the supreme law of the land and that the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.

Legislative
power of the
Union.

§ 53. The legislative power of the Union is vested in a Congress, consisting of a Senate, the members of which are chosen by the local legislatures of the several States, and a House of Representatives, elected by the people in each State. This Congress has power to levy taxes and duties, to pay the debts, and provide for the common defence and general welfare of the Union; to borrow money on the credit of the United States; to regulate commerce with foreign nations, among the several [79] States, and with the Indian tribes; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the Union; to coin money, and fix the standard of weights and measures; to establish post-offices and post-roads; to secure to authors and inventors the exclusive right to their writings and discoveries; to punish piracies and felonies on the high seas, and

subsequent Convention of Gastein, Prussia takes Schleswig and Lauenburg, with the port of Kiel, and the control of the canal from the German Ocean to the Baltic. Austria has Holstein, and receives 375,000*l.* for the surrender of Lauenburg. Yet the matter between the two powers is not entirely settled, and Prussia holds possession of Lauenburg. The only thing absolutely settled is, that the German Confederation is powerless against Prussia, and has little else remaining to it than a moral influence.

From 1859 to the present time, the constitution of the German confederacy and of the Zollverein have been the subjects of frequent attempts at reconstruction. The states of the second order began the movement in 1859, countenanced by Austria, Saxony taking the lead. Their proposition, known as the Dresden Project, was declined by Prussia, and the Prussian proposal of a restricted confederation, under her own direction, was opposed by Austria and the minor powers in sympathy with her. In the Zollverein, it had been customary for Prussia to negotiate the commercial treaties with foreign powers, and to sign and exchange them; leaving the other members of the union to give their adherence afterwards. The attempt to introduce Austria into the Zollverein, and the growing reluctance of the minor States to leave the treaty-making power to Prussia, make the continuance, or at least the renewal, of the Zollverein a matter of no little doubt. *Le Nord*, Aug. 15, Aug. 31, Oct. 18, Nov. 1 and 21, 1862.]—D.

[¹ For to them and their posterity read to ourselves and our posterity.]—G.G.W.

offences against the law of nations; to declare war, grant letters of marque and reprisal, and regulate captures by sea and land; to raise and support armies; to provide and maintain a navy; to make rules for the government of the land and naval forces; to exercise exclusive civil and criminal legislation over the district where the seat of the federal government is established, and over all forts, magazines, arsenals, and dock-yards belonging to the Union, and to make all laws necessary and proper to carry into execution all these and the other powers vested in the federal government by the Constitution.

§ 54. To give effect to this mass of sovereign authorities, the executive power is vested in a President of the United States, chosen by electors appointed in each State in such manner as the legislature thereof may direct. The judicial power extends to all cases in law and equity arising under the Constitution, laws, and treaties of the Union, and is vested in a Supreme Court, and such inferior tribunals as Congress may establish. The federal judiciary exercises under this grant of power the authority to examine the laws passed by Congress and the several State legislatures, and, in cases proper for judicial determination, to decide on the constitutional validity of such laws.³¹ The [80]

Executive power.

[³¹ *Relations of the United-States Judiciary to the Constitution and Statutes.*—The language of this clause may mislead foreign readers. There is no tribunal, under the Constitution, which has special and direct power to decide questions of constitutional law. The Supreme Court of the United States, like all the other courts, State or national, is simply a court of judicature, to decide controverted cases in law, equity, or admiralty, that are brought before it by actual litigants. It is not charged with any special function conservative of the Constitution, like the so-entitled Senate of the French Constitution of December, 1799. In cases before it, the Supreme Court has no other jurisdiction over constitutional questions than is possessed by the humblest judicial tribunal, State or national, in the land. The only distinction is, that it is the court of final resort, from whose decision there is no appeal. The relations of all the courts to the Constitution arise simply from the fact, that, being courts of law, they must give to litigants before them *the law*; and the Constitution of the United States is *law*, and not, like most European political constitutions, a collection of rules and principles having only a moral obligation upon the legislative and executive departments of the government. Accordingly, each litigant, having the right to the highest law, may [80] appeal from a statute of Congress or any other act of any officer or department, State or national, and invoke the Constitution, as the highest law. The court does not formally set aside or declare void any statute or ordinance inconsistent with the Constitution. It simply decides the case before it *according to law*; and, if laws are in conflict, according to that law *which has the highest authority*: that is, the Constitution. The effect of the decree of the final court on the *status* of the parties or property in that suit is, of course, absolute, and binds all departments of the government. The constitutional principle involved in the decision being ascertained from the opinion,—if the court sees fit to deliver a full opinion,—has in all future cases, in courts of law, simply the effect of a judicial precedent, whatever that may be. Upon the political departments of the government, and upon citizens, the principle decided has, in future cases, not the binding force of a portion of the Constitution, but the moral effect due to its intrinsic weight and to the character of the tribunal, and the practical authority derived from the consideration that all acts inconsistent with it will be inoperative, by reason of the judicial power, which any litigant may invoke against their operation; and from the further consideration that any attempts to act against it can only produce a conflict between departments of the government, in which the authority of the judiciary must prevail or be overthrown. But the court itself, in some subsequent case, upon further consideration, or by reason of changes in its members, may overrule its own precedent; and thus a law or doctrine long inoperative may be revived, or, long operative,

judicial power also extends to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United [81] States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of

may be set aside. The precise authority which a precedent of the Supreme Court, on a question of constitutional law, has upon the court itself, in subsequent cases, is too complex and uncertain for speculation here.

There need be no difficulty in apprehending the subject, if certain things are borne in mind: I. The Constitution is a code of positive law, as much as an act of the Legislature, and binding as positive law, upon all persons, official or unofficial, in all their relations, public or private, and upon all departments of the government, legislative, executive, and judicial. II. The courts have no *special* power to construe the Constitution, or to make interpretations of it which shall have the force of law. They have no function except to decide actual causes brought before them by litigating parties. As they must decide these causes according to law, they necessarily interpret the Constitution as they do any other form of law; but only for the purpose of deciding the case before them, and that is all they do decide. III. The American system being that of the Common Law, in which the principle of a judicial decision has the force of a precedent, the constitutional principle involved in deciding a case has that force. IV. The decree of the court on the subject-matter before it, must be executed by all the powers of the government; but the principle of constitutional law involved in the decision has not the force of a *law*, as to future cases, on a department, or a citizen in the discharge of his political duties. It has the moral and practical force of a judicial precedent. V. The practical effect of a judicial precedent of the Supreme Court is to settle a rule of construction for all inferior courts. It also settles a rule for the Supreme Court itself, not absolute, but practically permanent, unless very strong grounds appear for reversing it in some future case. The advantage of a settled rule, and the dangers and disadvantages of uncertain rules, are always great. Moreover, in the case of a purely judicial tribunal, as it cannot propound abstract rules of law, but only decide cases, a change of the principle of decision, in a case before it, operates as a surprise and injustice upon the parties in court, and upon all who have shaped their conduct by the principle once adopted by the court. This simple fact, seldom noticed,—that a court of law cannot adopt or declare a rule of interpretation, *in the abstract*, to operate only in future cases, as an act of the legislature operates, with notice to all, but, if it changes its principle of construction, must do so on a case *ex post facto*,—goes far to account for the obligation of judicial precedents. VI. A judicial precedent, on a question of constitutional political law, has no other than moral force on the legislative department, in its subsequent acts, and on citizens in their votes. For instance, if the Supreme Court decides a statute to be constitutional, that does not operate, as law, on the conscience of a member of the legislature, under his oath, so as to prevent him from voting to repeal it as unconstitutional; or to prevent a citizen from voting at elections, on that ground alone; or upon the President, to prevent his putting his veto on a renewal of such a law in a new case. So, if it decides a law unconstitutional, the legislature may retain the law on the statute-books, and renew it if it expires, leaving it to be inoperative, in the hope of a reversal of the decision by some changes in the court. This course raises only a question of comity and prudence. If the Supreme Court decides a certain bank-charter to be constitutional, Congress may decline to renew it when it has expired, or to grant a similar one to another company, solely on the ground that such charters, in their opinion, are not constitutional. No conflict is created, as the existing charter has effect everywhere, by force of the decision. If the Supreme Court decides that it is unconstitutional to prohibit slavery in a territory, Congress may still prohibit it in all future territorial bills; taking the chance of the court's not adhering to its doctrine. These are questions of policy and propriety, not of law.

This topic is peculiar to American jurisprudence. In England, an act of Parliament is supreme law: there being no positive, paramount constitution; and, on the continent, the doctrine of public law seems to be, that courts are not to go behind the external or formal legality of government acts.]—D.

different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.⁽¹⁾

§ 55. The treaty-making power is vested exclusively in the President and Senate; all treaties negotiated with foreign States being subject to their ratification. No State of the Union can enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in the payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; grant any title of nobility; lay any duties on imports or exports, except such as are necessary to execute its local inspection laws, the produce of which must be paid into the national treasury; and such laws are subject to the revision and control of the Congress. Nor can any State without the consent of Congress, lay any tonnage duty; keep troops or ships of war in time of peace; enter into any agreement or compact with another State or with a foreign power; or engage in war unless actually [82] invaded, or in such imminent danger as does not admit of delay. The Union guarantees to every State a republican form of government, and engages to protect each of them against invasion, and, on application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence.

Treaty-making power.

§ 56. It is not within the province of this work to determine how far the internal sovereignty of the respective States composing the Union is impaired or modified by these constitutional provisions. But since all those powers, by which the international relations of these States are maintained with foreign States, in peace and in war, are expressly conferred by the Constitution on the federal government, whilst the exercise of these powers by the several States is expressly prohibited, it is evident that the external sovereignty of the nation is exclusively vested in the Union. The independence of the respective States, in this respect, is merged in the sovereignty of the federal government, which thus becomes what the German public jurists call a *Bundesstaat*.³²

The American Union is a supreme federal government.

[³² *The United States a Supreme Government*.—The republic of the United States comes confessedly up to this second class, of a supreme federal government, or composite state, in its practical result. It is a new state or government, acting directly upon each individual, by its own officers and departments, in execution of its own laws. Within its sphere, it acts as if there were no separate States in existence. It is also the final judge, in a dispute between itself and a State, as to the limits of its sphere of action. It has been the doctrine of a political school, that the Constitution had its origin and authority from a compact of the States; but the doctrine more generally received is, that the people of the entire republic, as a political community, created the republic, as the people of each State created the separate States: the organic relation of each citizen to the republic being the same *in kind* as that he holds to the State in which he lives. This doctrine arises naturally out of the American principle that the political people are the sources of all authority, and the creators of the form of government under which they live.

But, whatever may be the theory, its consideration does not belong to international law.

[¹ See Amendment XI, 1798.]—G.G.W.

Swiss Confederation.

[83] § 57. The Swiss Confederation, as remodelled by the federal pact of 1815, consists of a union between the then twenty-two Cantons

It is enough to say, that the supremacy of the republic within its sphere, and its supreme right to determine the limits of its sphere, is now settled. Mr. Calhoun and the politicians of the South Carolina school, in 1831, at first contended for a right in each State to nullify any act of Congress within the limits of the State which, in the opinion of the State, should be unconstitutional or oppressive and unjust, and yet to remain in the Union. The impracticability of recognizing such a right as a legal right, the State still to remain in the Union and its people assisting to make laws for the republic, choosing which they will obey, soon brought this theory into disrepute, even with its original supporters; and they adopted the more practical doctrine of a right in a State to secede from the Union altogether, at its discretion. This doctrine, [83] known as the Right of Secession, soon supplanted the impracticable theory of Nullification. The right of secession was contended for as a *constitutional right*, binding on the rest of the Union whenever exercised by a State. No American questions the moral right of forcible revolution,—that is, the right of any part of a nation to appeal to force against a government, whenever a case justifying such a course shall arise,—or doubts the right of a government to suppress a revolution by force. But, in the attempt at secession in 1861, the movement was not put on the ground of a revolution, to be justified or condemned by the moral considerations by which revolutions are always to be judged, but on the ground of the exercise of a strictly legal right, by each State, which the general government is bound in law to respect. The reasoning upon which this theory rests is, that a State is supreme over the republic; for the doctrine is not only that, in a question of the limits of jurisdiction between a State and the republic, each State is the final and conclusive judge, but, further, that a State may withdraw, at any time, on the mere exercise of its discretion, the republic having no further right than to ascertain whether the State has acted. Such a doctrine as this, put in force by a large number of States, admitted of no practical solution but that which comes from the conflict of arms.

Slavery formed, in the main, the test of disloyalty. Every slave State was involved in the rebellion, with the exception of three border States,—Maryland, Kentucky, and Missouri, where there was a good deal of free labor, and in which the government was able to keep its military force, and where the union influence was strong. A rebel State itself was often divided geographically, as to loyalty, by the same test of slavery. In the western part of Virginia and eastern part of Tennessee, where there were few slaves, the people were loyal by a vast majority, and resisted the secession of their States, and furnished large bodies of troops for the Union armies. The same state of things existed, though in a less degree, in the upper and mountainous parts of North Carolina, Georgia, and Alabama. In some of the States, especially in South Carolina, there was unquestionably a large majority for secession: but, in other States, the majority was doubtful, sometimes generally believed to be loyal; and, in such cases, the ordinance of secession was either not put to a popular vote, or put to vote under circumstances that prevented a fair expression of opinion. By one means or another, eleven States were thrown into rebellion by the use of the political machinery of the States.

The ground taken by the government was simple. The principle of the Constitution is asserted in these plain words: 'This Constitution, and the laws of the United States, which shall be made in pursuance thereof, shall⁽¹⁾ be the supreme law of the land, any⁽²⁾ thing in the constitution and the⁽³⁾ laws of any State to the contrary notwithstanding.' The ordinances of secession were treated as void. Each citizen was held to his direct allegiance to the republic, a breach of which was treason, for which no action of his State, in whatever form conceived, could furnish any justification. Where the rebellion could be put down by civil force, that alone was exerted. Where military force was necessary, it was resorted to.

The States in rebellion organized a central government, which they called the Confederate States of America. In its details, it was a copy of the Constitution of the United States; but the language was carefully changed throughout, in order to alter the basis from that of a government created by the whole people to that of a kind of central agency delegated

[¹ For thereof, shall read and all treaties made, or which shall be made under the authority of the United States, shall.]—G.G.W.

[² For land, any read and; and the judges in every state shall be bound thereby, any.]—G.G.W.

[³ For and the read or.]—G.G.W.

of Switzerland; the object of which is [84] declared to be the preservation of their freedom, independence, and security against foreign

by sovereign and independent States. For [84] 'United States,' or 'Union,' was substituted, in their constitution, 'Confederate States,' with the phrase added, 'each State acting in its sovereign and independent character;' and the words, 'form a more perfect union, provide for the common defence, and promote the general welfare,' were stricken out; and for 'granted' was everywhere substituted 'delegated;' and other changes made, to carry out the same theory. It prohibited the passing of any law 'denying or impairing the right of property in negro slaves.' The Confederate Government became at once firmly established in the eleven States, organized in all its parts, and assumed the position of an independent nation. It punished as treason loyalty to the United States of any persons within its assumed limits. It treated as a war of invasion any attempt of the United States to exercise authority within the eleven States. When the United States refused to give up the national fort at the entrance of Charleston harbor (Fort Sumter), it was reduced by bombardment; and, when the United States attempted to restore its civil authority by the use of military force, the Confederacy declared war, and issued letters of marque. The United States did not, of course, declare war; for there was no body-politic against which to declare it, the very existence of the Confederate government being treason; and the separate States could not be regarded as capable of performing any function in hostility to the United States. The state of things was treated as a rebellion of individuals, risen to the dimensions of a war. It was met by the exercise of the powers of war on the part of the United States, practically, and for the purpose of suppressing the insurrection. The government did, in practice, treat the rebels as belligerents, while the war lasted; holding them as prisoners of war, making use of exchanges and other practices of war. This was from necessity, to prevent retaliation, and from humanity. No general *status* of belligerency was conceded to them by law; but the legal *status* of each person engaged in the rebellion was that of a criminal under the municipal law. When the rebellion was subdued, and its chief armies, under Lee and Johnston, were about to surrender, the leaders of the rebellion attempted to make some terms of peace between the Confederate authorities and the United States; but the course pursued by the government was in strict adherence to the principle upon which the secession had been dealt with from the beginning. The United States could recognize no authority, either of a State or of confederated States, capable even of making a surrender. It would deal only with each army before it, and accept its separate surrender to the commander of the Union army opposed to it, as a military act. The surrender of all the rebel armies left the confederacy simply to collapse. Neither its existence nor its disappearance was noticed legally by the United States.

The course pursued by the government as to individuals was this: All who had surrendered as prisoners of war, or who had been held or actually treated as such, were not to be proceeded against as criminals for the fact of having been engaged in the war. The right to try and punish for treason, after the war ended, persons who had been engaged in the original conspiracy which brought on the war, or, for any act of treason, persons who had not the privilege attached to prisoners of war, was held to be unimpaired by the acts of the government during the war. Military government was continued over all the rebel territory, with the suspension of the privilege of the writ of *habeas corpus*, until the civil authority of the republic should be fully restored. An entire political and civil restitution is not completed until the civil tribunals of the general government can exercise their authority peacefully within the limits of each [85] State, and the functions of that government be fully discharged. This requires, by the free system of the United States, a loyal co-operation of the people who exercise political power within each State, since they must hold many of the offices and compose the juries for the trial of all offences. It is also necessary that the State governments should be in active operation in conformity with and subordinate to the Constitution of the United States, not only for the administration of the internal affairs of each State, but to enable the people of the State to have their share in the administration of the government of the republic. Until these results are reached, the regions of country lately in rebellion, with their inhabitants, are held under the forcible or military government of the republic, as far as is necessary, although that government is exercised, to a great extent, by civil officers and civil methods.

There are various theories as to the *status* of the portions of the country lately in rebellion. Some consider the States as having ceased to exist, and the entire region they formerly occupied

attack, and of domestic order and tranquillity. The several Cantons guaranty to each other their [85] respective constitutions and territorial possessions. The Confederation has a common army and treasury, supported by levies of men and contributions of money, in certain fixed proportions, [86] among the different Cantons. In addition to these contributions, the military expenses of the Confederation are defrayed by duties on the importation of foreign merchandise, collected by the frontier Cantons, according to the tariff established by the Diet, and paid into the common treasury. The Diet consists of one deputy from every Canton, each having one vote, and assembles every year, alternately, at Berne, Zurich, and Lucerne, which are called the directing

to be national domain, under the government of the nation, in the same manner with what is known as the national 'territory,' lying beyond the limits of any States; while others regard the States as retaining their legal existence, and only to have been temporarily thrown out of their normal relations, by illegal force. The former theory admits of the exercise of supreme power by the general government, as a regular civil function in time of peace, under the Constitution, and extending over every possible subject of legislation, national or local, organic or functional. The latter theory derives the extraordinary authority of the republic over these regions and their inhabitants from the state of war, which must be considered as theoretically continuing until the civil governments, State and national, are satisfactorily restored. But, whatever the theory in these respects, all agree that the American system is one of separate States with a central State, and that this system must be restored to complete operation as soon as is practicable; and that a government over unrepresented people is an anomaly, dangerous to republican principles and habits, and to be exercised no longer than the necessity exists which the rebellion created.

The civil war saw the final and complete establishment of that construction of the Constitution which makes the United States a *State* in the scientific sense of the term; having direct authority over each citizen, to be exercised by its own officers, independently of the States; and a right to the direct allegiance of each citizen, from which no State action can absolve him; with the right to determine the limits of its own jurisdiction; with no appeal from its decision, except through the constitutional method of altering the laws or the administration, by the ballot, or through forcible revolution. The great features, however, in which the independence and safety of the States appear are, that the same people which constitute the States constitute the republic, and are the sources of all authority for each; that the national offices are all filled by citizens of some State; that these offices are held by popular elections for short periods, no family or class or section of people having any national interest distinct from their State interests; that the people have the deepest interest in keeping within their separate State control, where they have always been lodged, all those subjects which come most home to a people,—the family relations, the tenure and descent of property, education, religion, the entire civil police, and the civil relations of the people of each State with one another: all which are administered by State tribunals and officers, independently of central authority. There has never been in history a constitution analogous even, to that of the United States. The preservation of the distribution of powers would be in danger, if the central government were administered by a family or class which had a permanent interest in it; or if it derived its authority from any other source than that from which the States derive theirs; or if any one State had a larger interest or greater control over it than another; or if it had charge of any such subjects as have been enumerated; or, perhaps, if the tenure of national office was for life, or for very long periods, so as to create a permanent central interest, tempted to usurp upon the States. But, as the central government is administered only by agents sent out from the people of the States for short intervals, to return to the States again, having all their property and dearest interests within the States and subject to State control, and as the States offer employment and honors to talents, and no citizen can long hold political national life without the approval of the vote of his State, the reserved State-rights are felt to be in as much safety as can be predicated of human institutions.]—D.

Cantons, (*Vorort*). The Diet has the exclusive power of declaring war, and concluding treaties of peace, alliance, and commerce, with foreign States. A majority of three fourths of the votes is essential to the validity of these acts; for all other purposes, a majority is sufficient. Each Canton may conclude separate military capitulations and treaties, relating to economical matters and objects of police, with foreign powers; provided they do not contravene the federal pact, nor the constitutional rights of the other Cantons. The Diet provides for the internal and external security of the Confederation; directs the operations, and appoints the commanders of the federal army, and names the ministers deputed to other foreign States. The direction of affairs, when the Diet is not in session, is confided to the directing Canton, (*Vorort*), which is empowered to act during the recess. The character of directing Canton alternates every two years, between Zurich, Berne, and Lucerne. The Diet may delegate to the directing Canton, or *Vorort*, special full powers, under extraordinary circumstances, to be exercised when the Diet is not in session; adding, when it thinks fit, federal representatives, to assist the *Vorort* in the direction of the affairs of the Confederation. In case of internal or external danger, each Canton has a right to require the aid of the other Cantons; in [87] which case, notice is to be immediately given to the *Vorort*, in order that the Diet may be assembled, to provide the necessary measures of security.(a)

§ 58. The compact, by which the sovereign Cantons of Switzerland are thus united, forms a federal body, which, in some respects, resembles the Germanic Confederation, whilst in others it more nearly approximates to the American Constitution. Each Canton retains its original sovereignty unimpaired, for all domestic purposes, even more completely than the German States; but the power of making war, and of concluding treaties of peace, alliance, and commerce, with foreign States, being exclusively vested in the federal Diet, all the foreign relations of the country necessarily fall under the cognizance of that body. In this respect, the present Swiss Confederation differs materially from that which existed before the French Revolution of 1789, which was, in fact, a mere treaty of alliance for the common defence against external hostility, but which did not prevent the several Cantons from making separate treaties with each other, and with foreign powers.(a)

§ 59. Since the French Revolution of 1830, various changes have taken place in the local constitutions of the different Cantons, tending to give them a more democratic character; and several attempts have been made to revise the federal pact, so as to give it more of the character

Constitution of the Swiss Confederation compared with those of the Germanic Confederation and of the United States.

Abortive attempts, since 1830, to change the federal pact of 1815.

(a) Martens, *Nouveau Recueil*, tom. viii. p. 173.

(a) Merlin, *Répertoire*, tit. *Ministre Public*.

of a supreme federal government, or *Bundesstaat*, in respect to the internal relations of the Confederation. Those attempts have all proved abortive; and Switzerland still remains subject to the federal pact of 1815, except that three of the original Cantons,—Basle, Unterwalden, and Appenzel,—have been dismembered, so as to increase the whole number of Cantons to twenty-five. But as each division of these three original Cantons is entitled to half a vote only in the Diet, the total number of votes still remains twenty-two, as under the original federal pact.(a)³³

(a) Wheaton, Hist. Law of Nations, 494-496.

[³³ On the 12th September, 1848, a new constitution was adopted, having the same general character with the preceding, and, though giving more powers to the Confederation, still not coming within the definition of a *Bundesstaat*. The federal legislature has two houses,—the National Council and the Council of States. The former consists of representatives chosen according to population, and the latter of two deputies [88] from each canton. A federal council of seven, chosen by the legislature for three years, has charge of foreign affairs and certain executive duties, and is responsible to the legislature, in which its members have seats and a voice. The confederacy has charge of foreign affairs, posts, public roads, currency, weights and measures, and matters arising between the cantons. The distribution of jurisdiction between the cantons and the confederacy remains substantially as stated in the text. The confederacy has no army, but can organize and govern the contingents of the cantons when called into service. *Annuaire des deux Mondes*, 1850, p. 37. *Constitution Fédérale Suisse*.

Neuchâtel, (¹) as has been seen (*ante*, note 25), is now, by the treaty of 26th May, 1857, a regular canton of the confederacy; and the authority of the King of Prussia over it is abrogated.]—D.

[¹ For Neuchâtel read Neuchâtel.]—G.G.W.

[89] PART SECOND

ABSOLUTE INTERNATIONAL RIGHTS OF STATES

CHAPTER I

RIGHT OF SELF-PRESERVATION AND INDEPENDENCE

§ 60. THE rights, which sovereign States enjoy with regard to one another, may be divided into rights of two sorts: *primitive*, or *absolute* rights; *conditional*, or *hypothetical* rights.^(a)

Rights of sovereign States, with respect to one another.

Every State has certain sovereign rights, to which it is entitled as an independent moral being; in other words, because it is a State. These rights are called the *absolute* international rights of States, because they are not limited to particular circumstances.

The rights to which sovereign States are entitled, under particular circumstances, in their relations with others, may be termed their *conditional* international rights; and they cease with the circumstances which gave rise to them. They are consequences of a quality of a sovereign State, but consequences which are not permanent, and which are only produced under particular circumstances. Thus war, for example, confers on belligerent or neutral States certain rights, which cease with the existence of the war.³⁴

§ 61. Of the *absolute* international rights of States, one of the most essential and important, and that which lies [90] at the foundation of all the rest, is the right of self-preservation. It is not only a right with respect to other States, but a duty with respect to its own members, and the most solemn and important which the State owes to them. This right necessarily involves all other incidental rights, which are essential as means to give effect to the principal end.

Right of self-preservation.

§ 62. Among these is the right of self-defence. This again involves the right to require the military service of all its people, to levy troops and maintain a naval force, to build fortifications, and to impose and collect taxes for all these purposes. It is evident that the exercise of these absolute sovereign rights can be controlled only by the equal correspondent rights of other States, or by special compacts freely entered into with others, to modify the exercise of these rights.

Right of self-defence modified by the equal rights of other States, or by treaty.

In the exercise of these means of defence, no independent State can be restricted by any foreign power. But another nation may, by virtue of its own right of self-preservation, if it sees in these prepara-

(a) Klüber, *Droit des Gens Moderne de l'Europe*, § 36.

[³⁴ Is this distinction any thing more than the objective distinction between the permanent and the occasional? Self-preservation is classed by the author among absolute rights; and war, and all done by virtue of war, may be treated as only instances of the exercise of powers derived from the 'absolute right' of self-preservation.]—D.

tions an occasion for alarm, or if it anticipates any possible danger of aggression, demand explanations; and good faith, as well as sound policy, requires that these inquiries, when they are reasonable and made with good intentions, should be satisfactorily answered.

Thus, the absolute right to erect fortifications within the territory of the State has sometimes been modified by treaties, where the erection of such fortifications has been deemed to threaten the safety of other communities, or where such a concession has been extorted in the pride of victory, by a power strong enough to dictate the conditions of peace to its enemy. Thus, by the treaty of Utrecht, between Great Britain and France, confirmed by that of Aix-la-Chapelle, in 1748, and of Paris, in 1763, the French government engaged to demolish the fortifications of Dunkirk. This stipulation, so humiliating to France, was effaced in the treaty of peace concluded between the two countries, in 1783, after the war of the American Revolution. By the treaty signed at Paris, in 1815, between the Allied Powers and France, it was stipulated that the fortifications of Huningen, within the French territory, which had been constantly a subject of uneasiness to the city of Basle, in the Helvetic Confederation, should be demolished, and should never be renewed or replaced by other fortifications, at a distance of less than three leagues from the city of Basle.^(a)³⁵

Right of
intervention
or interfer-
ence.

§ 63. The right of every independent State to increase its national dominions, wealth, population, and power, by all innocent and lawful means; such as the pacific acquisition of new territory, the discovery and settlement of new countries, the extension of its navigation and fisheries, the improvement of its revenues, arts, agriculture, and commerce, the increase of its military and naval force; is an incontrovertible right of sovereignty, generally recognized by the usage and opinions of nations. It can be limited in its exercise only by the equal correspondent rights of other States, growing out of the same primeval right of self-preservation. Where the exercise of this right, by any of these means, directly affects the security of others,—as where it immediately interferes with the actual exercise of the sovereign rights of other States,—there is no difficulty in assigning its precise limits. But where it merely involves a supposed contingent danger to the safety of others, arising out of the undue aggrandizement of a particular State, or the disturbance of what has been called the balance of power, questions of the greatest difficulty arise, which belong rather to the science of politics than of public law.

The occasions on which the right of forcible interference has been

(a) Martens, *Recueil de Traités*, tom. ii. p. 469.⁽¹⁾

[³⁵ By the treaty of Paris, of 30 March, 1856, Russia and the Sultan agree not to establish or continue any marine arsenals on the shores of the Black Sea.]—D.

[¹ For 469 read 687.]—G.G.W.

exercised, in order to prevent the undue aggrandizement of a particular State, by such innocent and lawful means as those above mentioned, are comparatively few, and cannot be justified in any case, except in that where an excessive augmentation of its military and naval forces may give just ground of alarm to its neighbors. The internal development of the resources of a country, or its acquisition of colonies and dependencies at a distance from Europe, has never been considered a just motive for such interference. It seems to be felt, with respect to the latter, that distant colonies and dependencies generally weaken, and always render more vulnerable the metropolitan State. And with respect to the former, although the wealth and population of a country is the most effectual means by which its power can be augmented, such an augmentation is too gradual to excite alarm. To which [92] it must be added that the injustice and mischief of admitting that nations have a right to use force, for the express purpose of retarding the civilization and diminishing the prosperity of their inoffensive neighbors, are too revolting to allow such a right to be inserted in the international code. Interferences, therefore, to preserve the balance of power, have been generally confined to prevent a sovereign, already powerful, from incorporating conquered provinces into his territory, or increasing his dominions by marriage or inheritance, or exercising a dictatorial influence over the councils and conduct of other independent States.(a)

Each member of the great society of nations being entirely independent of every other, and living in what has been called a state of nature in respect to others, acknowledging no common sovereign, arbiter, or judge; the law which prevails between nations being deficient in those external sanctions by which the laws of civil society are enforced among individuals; and the performance of the duties of international law being compelled by moral sanctions only, by fear on the part of nations of provoking general hostility, and incurring its probable evils in case they should violate this law; an apprehension of the possible consequences of the undue aggrandizement of any one nation upon the independence and the safety of others, has induced the States of modern Europe to observe, with systematic vigilance, every material disturbance in the equilibrium of their respective forces. This preventive policy has been the pretext of the most bloody and destructive wars waged in modern times, some of which have certainly originated in well-founded apprehensions of peril to the independence of weaker States, but the greater part have been founded upon insufficient reasons, disguising the real motives by which princes and cabinets have been influenced. Wherever the spirit of encroachment has really threatened the general security, it has commonly broken out in such overt acts as not only plainly indicated the ambitious purpose, but also furnished

(a) Senior, *Edinb. Rev.* No. 156, art. 1, p. 329.

Wars of the
Reformation.

substantive grounds in themselves sufficient to justify a resort to arms by other nations. Such were the grounds of the confederacies created, and the wars undertaken to check the aggrandizement of Spain and the house of Austria, under Charles V. and his successors;—an object finally accomplished by the treaty of Westphalia, which so long constituted the written [93] public law of Europe. The long and violent struggle between the religious parties engendered by the Reformation in Germany, spread throughout Europe, and became closely connected with political interests and ambition. The great Catholic and Protestant powers mutually protected the adherents of their own faith in the bosom of rival States. The repeated interference of Austria and Spain in favor of the Catholic faction in France, Germany, and England, and of the Protestant powers to protect their persecuted brethren in Germany, France, and the Netherlands, gave a peculiar coloring to the political transactions of the age. This was still more heightened by the conduct of Catholic France under the ministry of Cardinal Richelieu in sustaining, by a singular refinement of policy, the Protestant princes and people of Germany against the house of Austria, whilst she was persecuting with unrelenting severity her own subjects of the reformed faith. The balance of power adjusted by the peace of Westphalia was once more disturbed by the ambition of Louis XIV., which compelled the Protestant States of Europe to unite with the house of Austria against the encroachments of France herself, and induced the allies to patronize the English Revolution of 1688, whilst the French monarch interfered to support the pretensions of the Stuarts. These great transactions furnished numerous examples of interference by the European States in the affairs of each other, where the interest and security of the interfering powers were supposed to be seriously affected by the domestic transactions of other nations, which can hardly be referred to any fixed and definite principle of international law, or furnish a general rule fit to be observed in other apparently analogous cases.(b)

Wars of
the French
Revolution.

§ 64. The same remarks will apply to the more recent, but not less important events, growing out of the French Revolution. They furnish a strong admonition against attempting to reduce to a rule, and to incorporate into the code of nations, a principle so indefinite, and so peculiarly liable to abuse, in its practical application. The successive coalitions formed by the great European monarchies against France subsequent to her first revolution of 1789, were avowedly designed to check the progress of her revolutionary principles, and the extension of her military power. Such was the principle of intervention in the internal affairs of France, avowed by the Allied Courts, and by the publicists who sustained their cause. France, on her side, relying on the independence of nations, contended for non-intervention as a right.

(b) Wheaton, *Hist. Law of Nations*, Part I, §§ 2, 3, pp. 80–88.

The efforts of these coalitions ultimately resulted in the formation of an alliance, intended to be permanent, between the four great powers of Russia, Austria, Prussia, and Great Britain, to which France subsequently acceded, at the Congress of Aix-la-Chapelle, in 1818, constituting a sort of superintending authority in these powers over the international affairs of Europe, the precise extent and objects of which were never very accurately defined. As interpreted by those of the contracting powers, who were also the original parties to the compact called the Holy Alliance, this union was intended to form a perpetual system of intervention among the European States, adapted to prevent any such change in the internal forms of their respective governments, as might endanger the existence of the monarchical institutions which had been re-established under the legitimate dynasties of their respective reigning houses. This general right of interference was sometimes defined so as to be applicable to every case of popular revolution, where the change in the form of government did not proceed from the voluntary concession of the reigning sovereign, or was not confirmed by his sanction, given under such circumstances as to remove all doubt of his having freely consented. At other times, it was extended to every revolutionary movement pronounced by these powers to endanger, in its consequences, immediate or remote, the social order of Europe, or the particular safety of neighboring States.

Alliance of
the five
great Euro-
pean powers.

The events, which followed the Congress of Aix-la-Chapelle, prove the inefficacy of all the attempts that have been made to establish a general and invariable principle on the subject of intervention. It is, in fact, impossible to lay down an absolute rule on this subject; and every rule that wants that quality must necessarily be vague, and subject to the abuses to which human passions will give rise, in its practical application.

§ 65. The measures adopted by Austria, Russia, and Prussia, at the Congress of Troppau and Laybach, in respect to the Neapolitan Revolution of 1820, were founded upon principles adapted to give the great powers of the European continent a perpetual pretext for interfering in the internal concerns of its different States. The British government expressly dissented from these principles, not only upon the ground [95] of their being, if reciprocally acted on, contrary to the fundamental laws of Great Britain, but such as could not safely be admitted as part of a system of international law. In the circular despatch, addressed on this occasion to all its diplomatic agents, it was stated that, though no government could be more prepared than the British government was to uphold the right of any State or States to interfere, where their own immediate security or essential interests are seriously endangered by the internal transactions of another State, it regarded the assumption of such a right as only to be justified by the

Congress
of Aix-la-
Chapelle, of
Troppau and
of Laybach.

strongest necessity, and to be limited and regulated thereby; and did not admit that it could receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular State or States, or that it could be made, prospectively, the basis of an alliance. The British government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circumstances of the case; but it at the same time considered, that exceptions of this description never can, without the utmost danger, be so far reduced to rule, as to be incorporated into the ordinary diplomacy of States, or into the institutes of the Law of Nations.^(a)

Congress
of Verona.

§ 66. The British government also declined being a party to the proceedings of the Congress held at Verona, in 1822, which ultimately led to an armed interference by France, under the sanction of Austria, Russia, and Prussia, in the internal affairs of Spain, and the overthrow of the Spanish Constitution of the Cortes. The British government disclaimed for itself, and denied to other powers, the right of requiring any changes in the internal institutions of independent States, with the menace of hostile attack in case of refusal. It did not consider the Spanish Revolution as affording a case of that direct and imminent danger to the safety and interests of other States, which might justify a forcible interference. The original alliance between Great Britain and the other principal European powers was specifically designed for the reconquest and liberation of the European continent from the military dominion of France; and, having subverted that dominion, it took the state of possession, as established by the peace, under the joint protection of the alliance. It never was, however, intended as an union for the government of the world, or for the superintendence of the internal affairs of other States. No proof had been produced to the British government of any design, on the part of Spain, to invade the territory of France; of any attempt to introduce disaffection among her soldiery; or of any project to undermine her political institutions; and, so long as the struggles and disturbances of Spain should be confined within the circle of her own territory, they could not be admitted by the British government to afford any plea for foreign interference. If the end of the last and the beginning of the present century saw all Europe combined against France, it was not on account of the internal changes which France thought necessary for her own political and civil reformation; but because she attempted to propagate, first, her principles, and afterwards, her dominion, by the sword.^(a)

(a) Lord Castlereagh's Circular Despatch, Jan. 19, 1821. Annual Register, vol. lxii. Part II. p. 737.

(a) Confidential Minute of Lord Castlereagh on the Affairs of Spain, communicated to

§ 67. Both Great Britain and the United States, on the same occasion, protested against the right of the Allied Powers to interfere, by forcible means, in the contest between Spain and her revolted American Colonies. The British government declared its determination to remain strictly neutral, should the war be unhappily prolonged; but that the junction of any foreign power, in an enterprise of Spain against the colonies, would be viewed by it as constituting an entirely new question, and one upon which it must take such decision as the interests of Great Britain might require. That it could not enter into any stipulation, binding itself either to refuse or delay its recognition of the independence of the colonies, nor wait indefinitely for an accommodation between Spain and the colonies; and that it would consider any foreign interference, by force or by menace, in the dispute between them, as a motive for recognizing the latter without delay.^(a)

War between Spain and her American colonies.

The United States government declared that it should consider any attempt, on the part of the allied European powers, to extend their peculiar political system to the American continent, as dangerous to the peace and safety of the United States. With the existing colonies or dependencies of any European power they had not interfered, and should not interfere; but with respect to the governments, whose independence they had recognized, they could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, in any other light than as a manifestation of an unfriendly disposition towards the United States. They had declared their neutrality in the war between Spain and those new governments, at the time of their recognition; and to this neutrality they should continue to adhere, provided no change should occur, which, in their judgment, should make a correspondent change, on the part of the United States, indispensable to their own security. The late events in Spain and Portugal showed that Europe was still unsettled. Of this important fact no stronger proof could be adduced than that the Allied Powers should have thought it proper, on any principle satisfactory to themselves, to have interposed by force in the internal concerns of Spain. To what extent such interpositions might be carried, on the same principle, was a question on which all independent powers, whose governments differed from theirs, were interested,—even those most remote,—and none more so than the United States.

The policy of the American government, in regard to Europe,

the Allied Courts in May, 1823.⁽¹⁾ *Annual Register*, lxx.; *Public Documents*, 93. Mr. Secretary Canning's Letter to Sir C. Stuart, 28th January, 1823, 114. Same to the Same, 31st March, 1823, 141.

(a) Memorandum of Conference between Mr. Secretary Canning and Prince Polignac, 9th October, 1823. *Annual Register*, lxxvi. 99. *Public Documents*.

[¹ For to the Allied Courts in May, 1823 read to the Courts of Austria, France, Prussia, and Russia, in May, 1820.]—G.G.W.

adopted at an early stage of the war which had so long agitated that quarter of the globe, nevertheless remained the same. This policy was, not to interfere in the internal concerns of any of the European powers; to consider the government, *de facto*, as the legitimate government for them; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy; meeting, in all instances, the just claims of every power,—submitting to injuries from none. But, with regard to the American continents, circumstances were widely different. It was impossible that the Allied Powers should extend their political system to any portion of these continents, without endangering the peace and happiness of the United States. It was therefore impossible that the latter should behold such interposition in any form with indifference.^(b)³⁶

(b) President Monroe's Message to Congress, 2d December, 1823. Annual Register, lkv. *Public Documents*, 193.

[³⁶ *The Monroe Doctrine*.—Certain declarations in the annual message of President Monroe of Dec. 2, 1823, relating to foreign affairs, have become known in history by [98] the compendious phrase, the 'Monroe Doctrine.' They have been the subject of a good deal of controversy and misunderstanding; and, as they have considerable moral influence among American traditions, it is important that they should be carefully examined in the light of the circumstances of the time, and of contemporaneous and subsequent exposition.

It will be found that the message contains two declarations, separated widely in the order of the message, and not less so in the circumstances out of which they arose, the state of things to which they were to be applied, and the principles of public law upon which they depended. Yet these have often been combined, if not confounded, into one doctrine. The first declaration related to new acquisition of sovereign title by European powers over any portions of the American continent, by occupation or colonization, as of unoccupied country. It was introduced in connection with the unsettled boundaries in the North-west. The second declaration related to interposition by European powers in the internal affairs of American States and was introduced in connection with the Spanish-American wars of independence. These two declarations require a separate treatment. I shall take up first that respecting colonization.

To understand the subject, it is necessary to refer to the state of things at the time of the declaration. The only European powers on the northern continent were Russia and Great Britain; for Spain had, by the treaty of 1819, ceded to the United States all her territory north of the forty-second parallel, and the successful revolution in Mexico had deprived her of the rest. The Czar, by a ukase of 4th September, 1821, had asserted exclusive territorial right, from the extreme northern limit of the continent to the fifty-first parallel; while, by the treaty of 1818 between Great Britain and the United States, these two powers had agreed to a joint occupation for ten years of all the country that might be claimed by either on the north-west coast, westward of the Rocky Mountains, without prejudice to the rights or claims of either party. At some future time or other, the boundaries between these powers must be settled; and, in a country situated as that was, it was well known that the sovereign title to most parts of it must depend upon original discovery, exploration, and occupation. In such controversies, it is known to be a question as obscure as it is important, what kind or degree of occupation, and under what circumstances made, is necessary to give exclusive sovereign jurisdiction. On the north-west coast, the facts of discovery, exploration, and occupation were already in dispute, and the meaning of the terms rendered more doubtful by the Nootka-Sound Convention, of 28th October, 1790, made by Great Britain with Spain, to whose rights in that region the United States succeeded. While Great Britain and the United States had a boundary line to run between themselves, they were yet united against the imperial ukase of 1821. In this position of things, Mr. J. Q. Adams, then Secretary of State, in a letter of July 2, 1823, wrote to Mr. Rush, our Minister at London, inclosing copies of his instructions to Mr. Middleton, our Minister at St. Petersburg, and asking him to confer freely with the British government upon the subject. In this letter and instructions, Mr. Adams takes the ground that the exclusive

[98] § 68. Great Britain had limited herself to protesting against the interference of the French government in the internal affairs of

British interference in the affairs of Portugal in 1826.

rights of Spain to any portion of the American continent have ceased, by force of treaties and of successful revolutions. He refers particularly to the burdensome and injurious restrictions and exclusions which have marked the European colonial systems in America, in respect of commerce, navigation, residence, and the use of rivers for passage, trade, and fishing. He contends [99] that the entire continent is closed against the establishment, by any European power, of any such colonial systems hereafter, in any places not now in their actual occupation, because of the sufficient sovereign title of the powers already established there to cover the entire continent. He says: 'A necessary consequence of this state of things will be, that the American continents henceforth will no longer be subject to⁽¹⁾ colonization. Occupied by civilized⁽¹¹⁾ nations, they will be accessible to Europeans and each other on that footing alone; and the Pacific Ocean, in every part of it, will remain open to the navigation of all nations in like manner with the Atlantic. Incidental to the condition of national independence and sovereignty, the rights of interior navigation of their rivers will belong to each of the American nations within its own territories.' In this letter is the germ of that portion of the Monroe Doctrine relating to non-colonization. Indeed, its paternity belongs to Mr. Adams. It rests on the assertion that the continent is '*occupied by civilized⁽¹¹⁾ nations*,' and is '*accessible to Europeans and each other on that footing alone*.'

When Mr. Rush made known Mr. Adams's letter to the British Cabinet, he asserts that they totally denied the correctness of the position, and that 'Great Britain considered the whole of the *unoccupied* parts of America as being open to her future settlements *in like manner as heretofore*;' that is, 'by priority of discovery and occupation.'

Four months after this letter, President Monroe, in his annual message, speaking of the North-western Boundary and the proposed arrangements with Great Britain and Russia, uses this language: 'In the discussions to which this interest has given rise, and in the arrangements in which they may terminate, the occasion has been judged proper for asserting, as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintained,⁽¹¹¹⁾ are henceforth not to be considered as subjects for future colonization by any European power.'^(1v) In taking this position, Mr. Monroe did not intend to establish a new system for America, defensive and exclusive against European powers, but intended only to apply to the state of things in America a recognized principle of public law. The only question can be, whether the state of things in America did or did not, at that time, warrant the application of the principle. In other words, was any part of the country so unoccupied and unappropriated by any civilized power as to be open to new acquisition on that ground; or was the whole continent so occupied and held as, upon principles of public law, to exclude the acquisition of sovereign title by virtue of subsequent occupation? The question presented was, in fact, one of political geography.

It is known that neither Great Britain nor Russia assented to the position taken by Mr. Adams, and now publicly announced by the President under his advice; for those powers had plans of extending their colonization and occupation, and contended that portions of the country were still open thereto upon principles of public law. In 1825-26, Mr. Adams, as President, had occasion to explain this declaration by reason of the proposal for the Panama Congress; and, in the debates upon the Panama mission, the subject was fully discussed. The Congress at Panama was proposed by the Spanish-American States, whose independence the United States had acknowledged, but who were still nominally at war with Spain. Their purpose was to form an alliance among the American States for self-defence, for the maintenance of peace upon the continent, and to settle some principles of public law to govern their relation with each [100] other. The United States was invited to take part in the Congress; and the proposal was well received by President Adams and Mr. Clay, his Secretary of State. Among the measures to be adopted by the Congress, the following was officially announced by Colombia, then the leading Spanish-American power: 'To take into consideration the means of making effectual the declaration of the President of the United States respecting any ulterior design

[1 For subject to read subjects of.]—G.G.W.

[11 For occupied by civilized read occupied by independent civilized.]—G.G.W.

[111 For maintained read maintain.]—G.G.W.

[1v For power read powers.]—G.G.W.

Spain, and had refrained from interpos[99]ing by force, to prevent the invasion of the peninsula by France. The constitution of the Cortes

of a foreign power to colonize any portion of this continent, and also the means of resisting all interference from abroad with the domestic concerns of the American governments.' A strong opposition arose in Congress to the Panama mission, and Mr. Adams offered an explanation of its probable results. In his special message to the Senate of Dec. 26, 1825,⁽¹⁾ he says: 'An agreement between all the parties represented at the meeting, that each will guard by its own means against the establishment of any future European colony within its borders, may be found advisable. This was more than two years since announced by my predecessor, as⁽¹¹⁾ a principle resulting from the emancipation of both the American continents.' Again, in his message to the House of Representatives, of March 26,⁽¹¹¹⁾ 1826, referring to this doctrine of non-colonization in Mr. Monroe's message of 1823, he says: 'The principle had first been assumed in the^(iv) negotiation with Russia. It rested upon a course of reasoning equally simple and conclusive. With the exception of the existing European colonies, which it was in nowise intended to disturb, the two continents consisted of several sovereign and independent nations, *whose territories covered their whole surface*. By this their independent condition, the United States enjoyed the right of commercial intercourse with every part of their possessions. To attempt the establishment of a colony in those possessions would be to usurp, to the exclusion of others, a commercial intercourse which was the common possession of all.'

The Spanish-American States had appeared to understand Mr. Monroe's message as 'a pledge,' by the United States, to the other American States, of mutual support in maintaining this doctrine; and to consider the United States bound to join with them in some alliance, offensive and defensive, for that purpose. Congress was unwilling to adopt the policy of entangling alliances. A resolution of the House of Representatives declared that the United States 'ought^(v) not to become parties with the Spanish-American republics,^(vi) or either of them, to any joint declaration for the purpose of preventing the interference of any of the European powers with their independence or form of government, or to any compact for the purpose of preventing colonization upon the continents^(vii) of America; but that the people of the United States should be left free to act, in any crisis, in such a manner as their feelings of friendship towards these republics, and as their own honor and policy may at the time dictate.'

The Senate confirmed the appointment of two commissioners for the Panama Congress, and the House of Representatives voted the appropriation; but, owing to the death of one commissioner and the delay of the other, the United States was not represented at the first session of the Congress, and a second session was never held. This was owing in part to the disturbed condition of the Spanish-American States, but more to their disappointment at the attitude of the United States. Whatever view the administration of Mr. Adams may first have taken, and however popular the proposal of the mission may have been at first, it is certain that the administration at last came to a narrow limitation of the project; and the public [101] judgment soon settled upon an opposition to the entire scheme. The opposition in Congress successfully contended, that, if the Panama meeting amounted to any thing, it would tend to establish on this continent, in the interests of republicanism, the same kind of system which had been established in Europe in the interests of despotism, and that the United States would necessarily be its protector, and the party responsible to the world; while the Spanish-American States would get the benefits of a system of mutual protection which the United States did not need.

In criticising Mr. Adams's language in his message of December 26,—'Each shall guard, *by its own means*, against the establishment of any future European colony within *its borders*,' which, he says, was the principle announced by his predecessor,—it is often said that he reduced this branch of the Monroe Doctrine to insignificance, as this is no more than States will naturally and necessarily do, without compact. But this is not a correct or sufficient view of the subject. Mr. Monroe had equally assumed, in 1823, that a sovereign State would not permit other sovereign States to appropriate its territory by colonization. On that assumption, he declared

[¹ For 1825 read 1826.]—G.G.W.

[¹¹ For predecessor, as read predecessor to the world as.]—G.G.W.

[¹¹¹ For 26 read 15.]—G.G.W.

[^v Omit quotation mark before ought.]—G.G.W.

[^{vi} Insert quotation mark before or.]—G.G.W.

[^{vii} For continents read continent.]—G.G.W.

[^{iv} For the read that.]—G.G.W.

was overturned, and Ferdinand VII. restored to absolute power. These events were followed by the [100] death of John VI., King of Portugal,

simply *the fact*, that the whole continent was within the territory of some responsible State, and not *feræ naturæ*, and so open to appropriation. It was this fact that was, at the time, disputed by European powers. Mr. Monroe did not declare or intimate, directly or indirectly, a *policy*—what the United States would do if a European power should attempt colonization within what he claimed to be our territory; still less, what we would do if a European power should attempt it in what we held to be the territory of some other American sovereign State. Our action, in either event, was left to be determined upon when the case should arise. When, therefore, the administration and Congress refused to make any compact, or commit the government in advance by pledge or understanding, to any system of co-operation in a future contingency, they did not abandon or qualify Mr. Monroe's position. The proper view, therefore, of Mr. Adams's proposal is, that each State represented at the Congress should make, for itself, the declaration which Mr. Monroe made for the United States in 1823: that is, that its territories were not open to appropriation by colonization, and pledge itself to resist any attempts in that direction. Even this proposal, simple and inefficient as it seemed, was objected to, as liable to be construed into an implied pledge of assistance to any State that should be driven to war to maintain it.

Mr. Everett, in his speech, said: 'On one of these points,—the resistance to colonization,—when the southern republics shall become fully informed of the position of the United States in reference to that question, most assuredly they will withdraw the wish, if they now entertain it, to enter into an alliance with us.' Mr. Webster said: 'We have a general interest, that, through all the vast territories rescued from the dominion of Spain, our commerce may find its way, protected by treaties *with governments existing on the spot*. These views, and others of a similar character, render it highly desirable to us that these new States should settle it, as a part of their policy, not to allow colonization within their respective territories. True, indeed, we do^[1] not need their aid to assist us in maintaining such a course for ourselves; but we have^[11] an interest in their assertion and their^[11] support of the principle as applicable to their own territories.' Mr. Clay, then Secretary of State, in his despatch of March 25, 1825, to Mr. Poinsett, our Minister to Mexico, referring to Mr. Monroe's declaration respecting colonization, says: 'Whatever foundation may have existed three centuries ago, or even at a later period, when all this continent was under European [102] subjection, for the establishment of a rule, founded on priority of discovery and occupation, for apportioning among the powers of Europe parts of this continent, none can now be admitted as applicable to its present condition. There is no disposition to disturb the colonial possessions, as they now exist, of any of the European powers; but it is against the establishment of new European colonies upon this continent, that this principle is directed. The countries in which any such new establishments might be attempted, are now open to the enterprise and commerce of all Americans; and the justice or propriety cannot be recognized of arbitrarily limiting and circumscribing that enterprise and commerce by the act of voluntarily planting a new colony, without the consent of America, under the auspices of foreign powers belonging to another and a distant continent. Europe would be indignant at an attempt^[1v] to plant a colony on any part of her shores; and her justice must perceive, in the rule contended for, only perfect reciprocity.'

President Polk, in his annual message to Congress, of Dec. 2, 1845, after dealing with the Oregon boundary question, and defending the annexation of Texas, and protesting against any possible interposition of European powers to prevent it, seeks to bring into service this portion of the Monroe Doctrine. Quoting the passage respecting colonization, he says: 'In the existing circumstances of the world, the present is deemed a proper occasion to reiterate and re-affirm the principle avowed by Mr. Monroe, and to state my cordial concurrence in its wisdom and sound policy.'^[v] Existing rights of every European nation should be respected: but it is due alike to our safety and our interests that the efficient protection of our laws should be extended over our whole territorial limits; and that it should be distinctly announced to the world as our settled policy, that no future European colony or dominion shall, with our

[¹ For do read did.]—G.G.W.

[¹¹ For have read had.]—G.G.W.

[^{1v} For at an attempt read at any American attempt.]—G.G.W.

[^v A sentence is omitted after the words sound policy.]—G.G.W.

[¹¹¹ Omit their.]—G.G.W.

in 1825. The constitution of Brazil had provided that its crown should never be united on the same head with that of Portugal; and Dom

consent, be planted or established on any part of the North-American continent.' It will be seen that Mr. Polk quotes no part of Mr. Monroe's message except the single paragraph relating to colonization. Professedly re-affirming that, he states a broader and very different doctrine: namely, not only that the continent is not open to colonization, but that no European 'dominion' shall be 'established' with our consent on any part of the North-American continent. This doctrine of Mr. Polk would require our consent to any acquisition of dominion by a European power, whether by voluntary cession or transfer, or by conquest.

Toward the close of the Mexican war, on the 29th April, 1848, Mr. Polk sent a special message to Congress on the subject of Yucatan. He represented that country as suffering severely from an insurrection of the native Indians, and as having offered to transfer to the United States 'the dominion and sovereignty of the peninsula,' if we would give them material aid in suppressing the insurrection. He added that they had applied also to Great Britain and Spain; and expressed the opinion, that, if we did not accept the offer, Yucatan might pass under the control of one of those powers. He then refers to the Monroe Doctrine as opposed to the transfer of American territory to any European power, and to the extension of their system to this hemisphere; quotes his own message of Dec. 2, 1845 (cited above); and recommends Congress to take measures to prevent Yucatan becoming a European colony, which, he says, 'in no event could be permitted by the United States.' A bill was immediately introduced into the Senate, authorizing the raising of an additional military force to enable the President to 'take temporary military possession' of Yucatan, and to aid its people against the Indians. A motion was made to amend the bill so as to [103] change entirely the character of the proposed step. The amendment was upon the theory that Yucatan might be treated by us as a part of the republic of Mexico, and occupied by us as part of our war against that power. This was supported by Mr. Jefferson Davis; but the administration party generally, led by Mr. Cass and Mr. Hannegan, favored the original bill, and supported it on the ground of preventing by anticipation a new European dependency. The opposition resisted both schemes throughout. While the discussion was going on, news arrived of a treaty between the Indians and whites in Yucatan; and the project of taking possession was abandoned. During this debate, Mr. Calhoun made a speech upon the Monroe Doctrine, significant from the fact that he was a leading member of Mr. Monroe's Cabinet at the time of the message, and at this time the only survivor. He gave the history of the declaration respecting foreign interposition in American affairs, now well known, and referred to hereafter; its origin in the attempt to extend the arm of the Holy Alliance over Spanish America; and states that the subject was gravely considered by the Cabinet, on receiving from Mr. Rush Mr. Canning's proposal, and that the language in which the declaration was couched was carefully weighed and agreed upon by the entire Cabinet. These are the passages at the close of the message, in connection with the affairs of Spanish America, relating to attempts of the European powers to extend their system over this hemisphere, and interpositions to oppress or control the destiny of any American State. As to the paragraph relating to colonization, introduced into the early part of the message, in connection with the British and Russian boundaries, Mr. Calhoun says that was not submitted to the Cabinet, and formed no part of the principle they intended to announce; but was a disconnected position taken by Mr. Adams, in the negotiations under his sole charge with Russia and England, which the President introduced into his message, by Mr. Adams's advice, in that connection. Mr. Calhoun treated it as limited to acquisitions of sovereignty over unoccupied regions of country by virtue of prior colonization, and as having no relation to such transfers of acknowledged sovereign territory as may be made by coercion or voluntary agreement between civilized nations. He says: 'The word "colonization" has a specific meaning. It means the establishment of a settlement, by emigrants from the parent country, in a territory either uninhabited, or from which the inhabitants have been partially or wholly expelled.' No doubt, the same objections existed against new foreign dominions, however they might be derived; but the paragraph only declared against deriving dominion from colonization, as not admissible in the condition which the continent had reached. As to the other and more general doctrine of opposition to European intervention, Mr. Calhoun took the ground which had been taken in the Panama discussion, and which the opposition was then holding in the case before the Senate,—that the United States was under no pledge to intervene against

Pedro resigned the [101] latter to his infant daughter, Dona Maria, appointing a regency to govern the kingdom during her minority, and,

intervention, but was to act in each case as policy and justice required; and that, in this case, there was no proof of a danger of actual transfer to a European power, or if there were, that the object was important enough to us to warrant our intervention.

At the time Mr. Calhoun made this speech, as has been said, neither Mr. Adams nor Mr. Monroe was living; but Mr. Calhoun referred back to his speech on the Oregon question, where he says he made the statement that the clause respecting colonization was not submitted to the Cabinet. 'I stated it in order that Mr. Adams might have an opportunity of denying it, or asserting the real state of the facts. He remained silent; and I presume that my statement is correct.' Calhoun's [104] Works, iv. 454. Mr. Calhoun's statement derives confirmation also from the fact that this subject of colonization is not noticed in the correspondence, hereafter cited, between Mr. Monroe and Mr. Jefferson, to whom the subject of a declaration had been referred by Mr. Monroe.

In explanation of this movement respecting Yucatan, and the attempt to invoke, in its aid, the popularity of the Monroe Doctrine, it should be remembered that the slave-power had obtained an ascendancy in the counsels of the nation; that Mr. Polk's administration was devoted to its interests; and that its purpose was to add slave States to the Union by extending our territory southward, and, eventually, by the acquisition of Cuba. It was not politic, with reference to its Northern adherents, to avow the motive; and its movements were made under the color of preventing foreign intervention or the acquisition of foreign dominion, and under the sanction of a popular tradition. Mr. Calhoun not only saw that the Monroe Doctrine was perverted, but believed that the cause of slavery extension would be perilled by involving the country in foreign complications in its behalf, on novel and doubtful principles.

A careful examination of this history, from the first letters of Mr. Adams to Mr. Rush and Mr. Middleton, in 1823, to the close of the Yucatan debate, will show that the general object of Mr. Adams was to prevent the establishment on this continent of new colonial dependencies of European powers. These were objectionable by reason of the restrictions and exclusions on commerce and navigation which, to that time, formed part of the European colonial systems, especially when such colonies lay at the mouth of a river occupied above by American colonies, or the converse; and by reason of the totally different political systems of which they would become a part, as distant from our own in principle as in geographic space. It was not necessary to declare that one State shall not appropriate by colonization part of the recognized territory of another State. That would be an act of war, the world over. It was not necessary to take the new and peculiar position, that, if any parts of this continent were lying *feræ naturæ* and beyond the recognized limits of a civilized State, they still should be closed to the colonization of any but the independent States of this continent: excluding not only European States unconnected with the continent, but those that now had possessions here. Mr. Adams thought the end could be attained by declaring that no part of the continent was in that condition; that it was all, in his own words, 'occupied by civilized nations,'⁽¹⁾ and 'accessible to Europeans and each other on that footing alone.' It will be seen that this declaration has ceased to be of much consequence, as no doubt can now be made that such is the present condition of the continent. By treaties and long possession, the boundaries of the continent have been adjusted, among the American States and the previously existing foreign colonies, upon the theory of including all parts of the continent within the domain of a recognized State, from the Polar Seas to the Straits of Magellan. If any portion of an American State should hereafter become a foreign dependency, it must be as a result of coercion or of voluntary compact, and not by virtue of title founded on appropriation by recent primary occupation.

In the debates in the Senate of the United States in 1855-56, on the construction to be given to the Clayton-Bulwer treaty of 1850, there was some discussion as to the effect of the phrase 'occupy and colonize.' That treaty, which was intended to secure an inter-oceanic transit across the Isthmus, and, for that purpose, to maintain the neutrality of the region in use, contained this clause: 'The governments of the [105] United States and Great Britain hereby

[¹ For occupied by civilized nations read occupied by independent civilized nations.]—G.G.W.

at the same time, granting a constitutional charter to the European dominions of [102] the House of Braganza. The Spanish government,

declare, that neither one⁽¹⁾ nor the other will ever⁽¹¹⁾ occupy or fortify or colonize, or assume or exercise any dominion over, Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America; nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have to or with any State or people, for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or of assuming or exercising dominion over the same.' The British Government took the position that this clause related only to future acts, and did not embrace places in their possession at the time the treaty was made. This construction was rejected by the United States. The words 'fortify or colonize, or assume . . . dominion over,' doubtless look solely to the future. The word 'occupy' may be ambiguous. It has, in the Law of Nations, a technical sense, derived from the Roman law, signifying the taking original possession of any thing not at the time in possession, and therefore open to appropriation,—as of animals *feræ naturæ*, or of things derelict, &c.; and, when applied to territory, signifying the acquisition of sovereign title by original occupation of a place not at the time within the occupation and jurisdiction of a recognized sovereignty. But, in its general and popular sense, it signifies merely the act or condition of possessing: as successive tenants are said to *occupy* a house, or a military force a town. In the former sense, the word would be limited to future acts; while, in the latter sense, it would not. But the American argument did not rest on the character of one word, but on the sense of the entire clause, especially as colored by the words 'exercise dominion.'

We now proceed to examine that distinct branch of the Monroe Doctrine which relates to European intervention in American affairs.

The result of the congresses at Laybach and Verona was an alliance of Russia, Prussia, Austria, and France; the ostensible object of which was to preserve the peace of Europe, and to put down conspiracies against established power, consecrated rights, and social order: but, as the allies acknowledged no legitimate basis of right and order except the existing hereditary sovereign houses of Europe, the practical result was a combination of forces against all changes in the direction of liberal institutions not voluntarily made by the sovereigns. In accordance with the spirit of this alliance, the movements for free constitutions in 1821 in Spain, Naples, and Piedmont, were put down by armed intervention, and absolutism re-instated. At this time, the Spanish colonies in America, after years of warfare, had substantially secured their independence, which had been recognized by the United States; but Spain still asserted her claim; and the independence of the provinces had not been acknowledged by Great Britain diplomatically, though she had sent consuls to their principal ports. In 1823, to carry out the purposes of the Holy Alliance, France invaded Spain, to suppress the constitutional government of the Cortes established there, and restore absolutism in the person of Ferdinand VII. As the success of the French invasion became certain, there were signs that the parties to the Holy Alliance intended to go further, and lend their aid to Ferdinand VII. to restore his dominion over the Spanish-American provinces. The fears of this course were justified by the previous language of the Holy Alliance. In the Laybach circular of May 12, 1821, they distinctly declared that they regarded 'as equally null, and disallowed by the public law of Europe, any pretended reform effected by revolt and open force;' and in their circular of Dec. 5, 1822, respecting the constitutional government in [106] Spain, they declared their resolution 'to repel the maxim of rebellion, in whatever place or under whatever form it might show itself;' thus repeating their claim made at Troppau, 'that the European powers have an undoubted right to take a hostile attitude in regard to those States in which the overthrow of the government might operate as an example.' England professed, also, to see indications that France intended to be compensated for her effective intervention, by a cession of some American province, and Cuba was the suspected reward.

Great Britain, who had never been party to this alliance, and protested against the intervention of 1821, took special umbrage at the French invasion of Spain, her late ally, from whose borders she had, only ten years before, expelled the French armies. There was a strong popular inclination in England to make this invasion a cause of war; but this was not seconded

[¹ For neither one read neither the one.]—G.G.W.

[¹¹ A clause relating to ship canal omitted here.]—G.G.W.

restored to the plenitude of its absolute authority, and dreading the example of the peaceable establishment of a constitutional government

by the ministry, who betook themselves to diplomatic efforts to defeat the schemes of the continental powers. The French Government, on its part, had its suggestion that the British Cabinet was determined to send a squadron, and take possession of Cuba. The people of Cuba, already divided between the parties of the king and the Cortes, and terrified by symptoms of slave insurrections, had among them large numbers who, dissatisfied with Spanish rule, looked to other powers for protection,—some to Great Britain, but far the larger part to the United States. About September, 1822, the latter party sent a secret agent to confer with President Monroe. They declared, that, if the United States Government would promise them protection, and ultimate admission into the Union, a revolution would be made to throw off the Spanish authority, of the success of which they had no doubt. While this proposition was before Mr. Monroe's Cabinet, he received an unofficial and circuitous communication from the French Minister, asserting that his government had positive information of the design of Great Britain to take possession of Cuba. The American Government replied to the Cuban deputation, that the friendly relations of the United States with Spain did not permit us to promise countenance or protection to insurrectional movements, and advised the people of Cuba to adhere to their Spanish allegiance; at the same time informing them that an attempt upon Cuba, by either Great Britain or France, would place the relations of Cuba with the United States in a very different position. Mr. Rush was instructed to inform Mr. Canning that the United States could not see with indifference the possession of Cuba by any European power other than Spain, and to inform him of the rumors that had reached the Cabinet. Mr. Canning disavowed emphatically all intention on the part of Great Britain to take possession of Cuba, but avowed her determination not to see with indifference its occupation by either France or the United States; and proposed an understanding between the British, French, and American governments, without any formal convention, that Cuba should be left in the quiet possession of Spain. This was assented to by Mr. Monroe; but he had no communication with France on the subject, leaving that to the management of Great Britain.

As respects the Spanish colonies which had been at war with Spain for their independence, the United States were naturally anxious about the movements of the allies; and Mr. Adams had communicated to Mr. Rush at London, in general terms, the strong feeling of the government, and the earnest popular opinion on that subject. The British Government was also very solicitous to prevent all intervention against those provinces by the continental powers, and to leave them free to [107] complete their independence. This would not only, with the arrangement respecting Cuba, defeat the Transatlantic schemes of France, if she had any, and, in the famous words of Mr. Canning, 'call the new world into existence to redress the balance of the old,' but would repress generally the absolutist powers on the continent, avenge the affront to Great Britain by the invasion of Spain, and procure for England the benefit of an unrestricted commerce with Spanish America. Mr. Canning feared that a formal recognition of the independence of those colonies might involve England in a war with the continental powers; but was confident that their independence would be secured, if all intervention or hope of intervention in aid of Spain, could be effectually precluded. With this view, Mr. Canning, in August and September, 1823, urged upon Mr. Rush a combined declaration by Great Britain and the United States to the effect, that, while they aimed at the possession of no portion of the Spanish colonies for themselves, and would not obstruct any amicable negotiations between the colonies and the mother country, they could not see with indifference the intervention of any foreign power, or the transfer to such power of any of the colonies. In support of his request, Mr. Canning stated that a proposal would be made for a European Congress, to settle the affairs of Spanish America; and said that Great Britain would take no part in it, except upon the terms that the United States should be represented. Mr. Rush replied, as to the Congress, that it was the traditional policy of the United States to take no part in European politics; and, having no instructions from his government, said he would still take the responsibility of joining in the declaration, if Great Britain would first acknowledge the independence of the colonies. Mr. Canning not being ready to take this decisive step, the proposed joint declaration was never made; but Mr. Rush communicated the proposal to his government; the result of which was the celebrated declaration against European intervention in Mr. Monroe's annual message of Dec. 2, 1823.

in a [103] neighboring kingdom, countenanced the pretensions of Dom Miguel to the Portuguese crown, and supported the efforts of his

In Mr. Monroe's Cabinet at that time, John Quincy Adams was Secretary of State, and Mr. Calhoun Secretary of War; and, beside the advice derived from them, Mr. Monroe laid the subject of Mr. Canning's proposal before Mr. Jefferson,—then in retirement,—and asked his opinion. Mr. Jefferson replied by an elaborate letter, of 24 October, 1823. (Jefferson's Life, iii. 491.) He says: 'Our first maxim⁽¹⁾ should be, never to entangle ourselves in the broils of Europe; our second, never to suffer Europe to intermeddle with Cisatlantic affairs.' Referring to the great power Great Britain could wield for good or evil in these controversies, and expressing his gratification at the stand she was then taking, and recognizing the fact that we could not join in the declaration if we had any designs upon Cuba or any American State ourselves, he advised Mr. Monroe to join in the declaration, which Mr. Jefferson worded thus: 'That we aim not at the acquisition of any of those possessions; that we will not stand in the way of any amicable arrangement between the colonies and their⁽¹¹⁾ mother country; that⁽¹¹¹⁾ we will oppose with all our means the forcible interposition of any other power as auxiliary, stipendiary, or under any other form or pretext, and most especially their transfer to any power by conquest, cession, or acquisition in any other way.'

It will be seen that the administration did not accept Mr. Canning's proposal for a joint declaration, but spoke for the United States alone; and, in doing so, did not adopt the declaration proposed by Mr. Canning and recommended by Mr. Jefferson, but a very different one. After treating of various other matters, foreign and domestic, as [108] usual in the annual message, Mr. Monroe passes, towards its close, to speak of the efforts in Spain and Portugal to improve the condition of the people, and of the general disappointment of the expectations of the American people in favor of the liberty and happiness of their fellow-men on that side of the Atlantic, and says: 'In the wars of the European powers, in matters relating to themselves, we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are invaded or seriously menaced that we resent injuries, or make preparation for our defence. With the movements in this hemisphere we are, of necessity, more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective governments. And to the defence of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of our^(1v) most enlightened citizens, and under which we have enjoyed an unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare, that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power, we have not interfered, and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States. In the war between those new governments and Spain, we declared our neutrality at the time of their recognition; and to this we have adhered, and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this government, shall make a corresponding change on the part of the United States indispensable to their security.' Then, speaking of the recent forcible interposition by the allies in the internal concerns of Spain, he says: 'To what extent such interposition may be carried, on the same principle, is a question in which all independent powers whose governments differ from theirs are interested, and even^(v) those most remote, and surely none more so than the United States. Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same; which is, not to interfere in the internal concerns of any of

¹ For Our first maxim read Our first and fundamental maxim.]—G.G.W.

¹¹ For the colonies and their read them and the.]—G.G.W.

¹¹¹ For country; that read country, but that.]—G.G.W.

^{1v} For our read their.]—G.G.W.

^v For and even read even.]—G.G.W.

partisans to overthrow the regency and the charter. Hostile inroads into [104] the territory of Portugal were concerted in Spain, and

its powers; to consider the government *de facto* as the legitimate government for us; to cultivate friendly relations with it; and to preserve those relations by a frank, firm, and manly policy, meeting in all instances the just claims of every power, submitting to injuries from none. But, in regard to these⁽¹⁾ continents, circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can any one believe that our Southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition in any form with indifference. If we look to the comparative strength and resources of Spain and those new governments, and their distance from each other, it must be obvious that she can never subdue them. It is still the [109] true policy of the United States to leave the parties to themselves, in the hope that the other powers will pursue the same course.'

This message of President Monroe reached England while the correspondence between Mr. Canning and the Prince Polignac was in progress; and it was received not only with satisfaction, but with enthusiasm. Mr. Brougham said: 'The question with regard to Spanish America is now, I believe, disposed of, or nearly so; for an event has recently happened than which none has ever dispersed greater joy, exultation, and gratitude over all the free men of Europe: that event, which is decisive on the subject, is the language held with respect to Spanish America in the message of the President of the United States.' Sir James Mackintosh said: 'This coincidence of the two great English commonwealths (for so I delight to call them; and I heartily pray that they may be for ever united in the cause of justice and liberty) cannot be contemplated without the utmost pleasure by every enlightened citizen of the earth.' This attitude of the American government gave a decisive support to that of Great Britain, and effectually put an end to the designs of the absolutist powers of the continent to interfere with the affairs of Spanish America. Those dynasties had no disposition to hazard a war with such a power, moral and material, as Great Britain and the United States would have presented, when united in the defence of independent constitutional governments.

It is to be borne in mind that the declarations known as the Monroe Doctrine have never received the sanction of an act or resolution of Congress; nor have they any of that authority which European governments attach to a royal ordinance. They are, in fact, only the declarations of an existing administration of what its own policy would be, and what it thinks should ever be the policy of the country, on a subject of paramount and permanent interest. Thus, at the same session in which the message was delivered, Mr. Clay introduced the following resolution: 'That the people of these States would not see, without serious inquietude, any forcible interposition by the allied powers of Europe, in behalf of Spain, to reduce to their former subjection those parts of the continent of America which have proclaimed and established for themselves, respectively, independent governments, and which have been solemnly recognized by the United States.' But this resolution was never brought up for action or discussion. It is seen also, by the debates on the Panama mission and the Yucatan intervention, that Congress has never been willing to commit the nation to any compact or pledge on this subject, or to any specific declaration of purpose or methods, beyond the general language of the message.

In the debates on the Clayton-Bulwer treaty, in 1855-56, above referred to, all the speakers seemed to agree to this position of the subject. Mr. Clayton said: 'In reference to this particular territory, I would not hesitate at all, as one Senator, to assert the Monroe Doctrine and maintain it by my vote; but I do not expect to be sustained in such⁽¹¹⁾ a vote by both branches of Congress. Whenever the attempt has been made to assert the Monroe Doctrine in either branch of Congress, it has failed. The present Democratic party came into power, after the debate on the Panama mission, on the utter abnegation of the whole doctrine, and stood upon Washington's doctrine of non-intervention.⁽¹²⁾ You cannot prevail on a majority, and I will venture to say that you cannot prevail on one-third, of either house of Congress to sustain it.' Mr. Cass said: 'Whenever the Monroe Doctrine has been urged, either one or the

[¹ For these read those.]—G.G.W.

[¹¹ For in such read in that, or does any other man here expect to be sustained in such.]—G.G.W.

[¹² A clause is omitted after the word non-intervention.]—G.G.W.

executed with the connivance of the Spanish authorities, by Portuguese troops, belonging to the party of the Pretender, who had deserted

other house of Congress,^[1] or both houses, did not stand up to it.' Mr. Seward said: 'It is true that [110] each house of Congress has declined to assert it; but the honorable senators must do each house the justice to acknowledge that the reason why they^[11] did decline to assert the^[111] doctrine was, that it was proposed, as many members thought, as an abstraction, unnecessary, not called for at the time.' Mr. Mason spoke of it as having 'never been sanctioned or recognized by any constitutional authority.' Mr. Cass afterwards, in a very elaborate speech (of Jan. 28, 1856), gave his views of the history and character of the doctrine. He placed it upon very high ground, as a declaration not only against European intervention or future colonization, but against the acquisition of dominion on the continent by European powers, by whatever mode or however derived; and seemed to consider it as a pledge to resist such a result by force, if necessary, in any part of the continent. He says: 'We ought years ago, by Congressional interposition, to have made this system of policy an American system, by a solemn declaration; and, if we had done so, we should have spared ourselves much trouble and no little mortification.' Referring to Mr. Polk's message, in 1845, he said there was then an opportunity for Congress to adopt the doctrine, not as an abstraction, but on a practical point. 'We refused to say a word; and, I repeat, we refused then even to take the subject into consideration.' He denied the correctness of Mr. Calhoun's explanation (*vide supra*), and contended that the non-colonization clause was intended to be, and understood by England to be, a foreclosure of the whole continent against all future European dominion, however derived. It may well be said, however, and such seems now to be the prevalent opinion, that the complaints of Mr. Cass and others of his school, of the neglect and abandonment of the Monroe Doctrine, apply rather to their construction of the doctrine than to the doctrine itself.

That the declarations in Mr. Monroe's message arose out of the apprehension that the Holy Alliance sought to extend its system to the American colonies, and possibly to independent American States, there can be no doubt. The only points made by Mr. Monroe are—'Any attempt on their part to extend their system [the political system of the Holy Alliance] to any portion of this hemisphere;' and 'Any interposition for the purpose of oppressing them [the American States], or controlling in any other manner their destiny.' It is observable that the protest is against certain modes of European action, and not against new acquisitions specifically, nor even inferentially, if made, for instance, by treaties in which there should be no coercion and no interposition by third powers, or by conquest in a war not waged for the policy or purpose objected to. Mr. Jefferson, in his letter above referred to, had noticed this subject, and placed among the acts we should oppose 'their transfer to any power by conquest, cession, or acquisition in any other way.' Still, Mr. Monroe's Cabinet made no declaration on the point of transfer of dominion. It is also to be observed that Mr. Canning's proposition to Mr. Rush was for a joint declaration by the two governments of a double proposition,—1st, That they did not aim at the possession of any portion of the Spanish colonies for themselves; and, 2d, That 'they could not see the transfer of any portion of them to any other power with indifference.' This double proposition, communicated by Mr. Rush to the President and by him to Mr. Jefferson, and recommended by Mr. Jefferson and laid before the Cabinet, is still not adopted in the message. Confining itself to a declaration against interposition to oppress or control, or to extend the system of the Holy Alliance to this hemisphere, the message avoids committing the government on the subject of [111] acquisition, either by the United States or the European powers, and whether by voluntary cession or conquest. Possibly the administration may have paused at Mr. Jefferson's caution in his letter referred to:—'But we must first ask^[1v] ourselves a question,—Do we wish to acquire any^[v] one or more of the Spanish provinces?^[vi]—before we can unite in the proposed joint declaration.'^[vii] Mr. Jefferson confesses that, in his opinion, Cuba would be 'the most interesting addition that^[viii] could ever

[1 For either one or the other house of Congress read either one House of Congress or the other.]—G.G.W.

[11 For they read each House.]—G.G.W.

[111 For the read that.]—G.G.W.

[1v For must first ask read have first to ask.]—G.G.W.

[v For acquire any read acquire to our own confederacy any.]—G.G.W.

[vi Insert quotation mark after word provinces?]—G.G.W.

[vii Omit quotation mark after word declaration.]—G.G.W.

[viii For that read which.]—G.G.W.

[105] into Spain, and were received and succored by the Spanish authorities on the frontiers. Under these circumstances, the British

be made to our system of States; yet is willing, in view of the great advantages to be gained by the joint declaration, to forego Cuba. The slaveholding interest was clearly looking to Cuba, not only as an addition to its political power in the Union, but to prevent abolition of slavery there by some other power; and it is known that Mr. Adams had a noticeable leaning in favor of its importance to us in a military and commercial view. The Texas question was already looming in the distance; and it was but three years since we had acquired Florida, and but twenty years since we had purchased the vast Louisiana territory. Twenty-two years after this, we annexed Texas; and, twenty-five years after, we acquired by conquest California and New Mexico; and, for several years before the civil war of 1861, the slave-power in the Union was exerting itself to annex Cuba. It is true the government had, as has been seen, exchanged declarations with England as to Cuba; but then, as later, when, in 1854, the tripartite alliance for the retention of Cuba by Spain was proposed, we were not willing to commit ourselves to absolute guaranties on that point: and a successful revolution in Cuba might have made, at any time, an opening for her annexation. When we compare the declarations in the message with the joint declaration proposed by Mr. Canning and recommended by Mr. Jefferson, and consider our own prior history and our then position, it certainly is a fair inference that the administration purposely avoided any specific and direct statement as to transfer of dominion by competent parties, in the way of treaty, or by conquest in war.

In further explanation of the Monroe Doctrine, it is to be noticed that it is correctly called a doctrine, and no more. There is no intimation what the United States will do in case of European interposition, or what means it will take to prevent it. The United States have steadily refused to enter into any arrangement with the other American States for establishing a continental system on that point, or for mutual defence, or even to commit themselves in the way of pledge or promise. When the Spanish-American States wished to treat the message of 1823 as a 'pledge' to them for the future, that construction of it was successfully resisted by the opposition, however favorably it may be thought Mr. Adams and his Cabinet at first regarded it. And public opinion may be considered as settled on the point that the action of the nation, in any case that may arise, must be unembarrassed by pledge or compact; and, further, as equally settled, against the introduction of any thing approaching the nature of a Holy Alliance for this continent, though it be in the interests of republican institutions.

It has sometimes been assumed that the Monroe Doctrine contained some declaration against any other than democratic-republican institutions on this continent, however arising or introduced. The message will be searched in vain for any thing of the kind. We were the first to recognize the imperial authority of Don Pedro in Brazil, and of Iturbide in Mexico; and more than half the northern continent was under the sceptres of Great Britain and Russia; and these dependencies would certainly [112] be free to adopt what institutions they pleased, in case of successful rebellion, or of peaceful separation from their parent States. (See Mr. Seward's correspondence respecting Mexico, from 1862 to 1866, as illustrative of the position of the United States at the present time on this subject, given at length in note 41 to § 76 *infra*.)

As a summary of this subject, it would seem that the following positions may be safely taken: I. The declarations upon which Mr. Monroe consulted Mr. Jefferson and his own Cabinet related to the interposition of European powers in the affairs of American States. II. The kind of interposition declared against was that which may be made for the purpose of controlling their political affairs, or of extending to this hemisphere the system in operation upon the continent of Europe, by which the great powers exercise a control over the affairs of other European States. III. The declarations do not intimate any course of conduct to be pursued in case of such interpositions, but merely say that they would be 'considered as dangerous to our peace and safety,' and as 'the manifestation of an unfriendly disposition toward the United States,' which it would be impossible for us to 'behold with indifference;' thus leaving the nation to act at all times as its opinion of its policy or duty might require. IV. The declarations are only the opinion of the administration of 1823, and have acquired no legal force or sanction. V. The United States has never made any alliance with, or pledge to, any other American State on the subject covered by the declarations. VI. The declaration respecting non-colonization was on a subject distinct from European intervention with American States, and related to the acquisition of sovereign title by any European power, by

government received an application from the regency of Portugal, [106] claiming, in virtue of the ancient treaties of alliance and friendship subsisting between the two crowns, the military aid of Great Britain against the hostile aggression of Spain. In acceding to [107] that application, and sending a corps of British troops for the defence of Portugal, it was stated by the British minister that the Portuguese Constitution was admitted to have proceeded from a [108] legitimate source, and it was recommended to Englishmen by the ready acceptance which it had met with from all orders of the Portuguese people. But it would not be for the British nation to [109] force it on the people of Portugal, if they were unwilling to receive it; or if any schism should exist among the Portuguese themselves, as to its fitness and congeniality to the wants and wishes [110] of the nation. They went to Portugal in the discharge of a sacred obligation, contracted under ancient and modern treaties. When there, nothing would be done by them to enforce the establishment [111] of the constitution; but they must take care that nothing was done by others to prevent it from being fairly carried into effect. The hostile aggression of Spain, in countenancing and aiding the party [112] opposed to the Portuguese Constitution, was in direct violation of repeated solemn assurances of the Spanish cabinet to the British [113] government, engaging to abstain from such interference. The sole object of Great Britain was to obtain the faithful execution of those engagements. The former case of the invasion of Spain by France, having for its object to overturn the Spanish Constitution, was essentially different in its circumstances. France had given to Great Britain cause of war by that aggression upon the independence of Spain. The

new and original occupation or colonization thereafter. Whatever were the political motives for resisting such colonization, the principle of public law upon which it was placed was, that the continent must be considered as already within the occupation and jurisdiction of independent civilized nations.

On this subject, the reader is referred to the following authorities:—Mr. Adams to Mr. Rush, July 2, 1823; Mr. Monroe's message, Dec. 2, 1823; Mr. Rush's Memoranda of Residence at the Court of London; Stapleton's Life of Canning; Briefwechsel zwischen Varnhagen von Ense und Oelsner, vol. iii.; Mr. Clay's resolution, offered Jan. 20, 1824; the ukase of the Emperor Alexander, Sept. 4, 1821; the treaty between the United States and Spain, 22 February, 1819; the Nootka-Sound Convention between Spain and Great Britain of 28 October, 1790; Mr. Monroe's annual message, Dec. 7, 1824; Mr. Adams's messages of Dec. 26, 1825, and March 26,^[1] 1826; Mr. Clay's despatch to Mr. Poinsett, March 25, 1825; Mr. Webster's speech on the Panama mission, Webster's Works, iii. 178; Mr. Everett's speech on the same, Cong. Debates, 1826; Mr. Calhoun's speech on the Yucatan question, Calhoun's Works, iv. 454; Mr. Polk's annual message of Dec. 2, 1845; his special message on Yucatan, of April 29, 1848; the debate in the Senate on the Yucatan question, April and May, 1848, Congress. Globe, 1848, p. 712 *et seq.*; the Clayton-Bulwer treaty, United-States Laws, x. 995; Debates in the United-States Senate on the Clayton-Bulwer treaty, 1855-56, Congress. Globe and Appendix for 1st Sess. 34th Cong.; North-American Review, 1856, p. 478; Mr. Everett's letter of Sept. 2, 1863, on the Monroe Doctrine, in the New-York Ledger; Letter of J. Q. Adams on the same, to the Rev. Dr. Channing, of Aug. 11, 1837; Mr. Canning's speech of Dec. 12, 1826; Mr. Buchanan's article on the Monroe Doctrine, in his History of his Administration, p. 276.]—D.

[¹ For 26 read 15.]—G.G.W.

British government might lawfully have interfered, on grounds of political expediency; but they were not bound to interfere, as they were now bound to interfere on behalf of Portugal, by the obligations of treaty. War might have been their free choice, if they had deemed it politic, in the case of Spain; interference on behalf of Portugal was their duty, unless they were prepared to abandon the principles of national faith and national honor.^(a)

§ 69. The interference of the Christian powers of Europe, in favor of the Greeks, who, after enduring ages of cruel oppression, had shaken off the Ottoman yoke, affords a further illustration of the principles of international law authorizing such an interference, not only where the interests and safety of other powers are immediately affected by the internal transactions of a particular State, but where the general interests of humanity are infringed by the excesses of a barbarous and despotic government. These principles are fully recognized in the treaty for the pacification of Greece, concluded at London, on the 6th of July, 1827, between France, Great Britain, and Russia. The preamble of this treaty sets forth, that the three contracting parties were 'penetrated with the necessity of putting an end to the sanguinary contest, which, by delivering up the Greek provinces and the isles of the Archipelago to all the disorders of anarchy, produces daily fresh impediments to the commerce of the European States, and gives occasion to piracies, which not only expose the subjects of the high contracting parties to considerable losses, but, besides, render necessary burdensome measures of protection and repression.' It then states that the British and French governments, having received a pressing request from the Greeks to interpose their mediation with the Porte, and being, as well as the Emperor of Russia, animated by the desire of stopping the effusion [114] of blood, and of arresting the evils of all kinds which might arise from the continuance of such a state of things, had resolved to unite their efforts, and to regulate the operations thereof by a formal treaty, with the view of re-establishing peace between the contending parties, by means of an arrangement, which was called for as much by humanity as by the interest of the repose of Europe. The treaty then provides, (article 1,) that the three contracting powers should offer their mediation to the Porte, by a joint declaration of their ambassadors at Constantinople; and that there should be made, at the same time, to the two contending parties, the demand of an immediate armistice, as a preliminary condition indispensable to opening any negotiation. Article 2d provides the terms of the arrangement to be made, as to the civil and political condition of Greece, in consequence of the principles of a previous understanding between Great Britain and Russia. By the 3d

Interference of the Christian powers of Europe, in favor of the Greeks.

(a) Mr. Canning's Speech in the House of Commons, 11th December, 1826. Annual Register, lxxviii. 192.

article it was agreed, that the details of this arrangement, and the limits of the territory to be included under it, should be settled in a separate negotiation between the high contracting powers and the two contending parties. To this public treaty an additional and secret article was added, stipulating that the high contracting parties would take immediate measures for establishing commercial relations with the Greeks, by sending to them and receiving from them consular agents, so long as there should exist among them authorities capable of maintaining such relations. That if, within the term of one month, the Porte did not accept the proposed armistice, or if the Greeks refused to execute it, the high contracting parties should declare to that one of the two contending parties that should wish to continue hostilities, or to both, if it should become necessary, that the contracting powers intended to exert all the means, which circumstances might suggest to their prudence, to give immediate effect to the armistice, by preventing, as far as might be in their power, all collision between the contending parties. The secret article concluded by declaring, that if these measures did not suffice to induce the Ottoman Porte to adopt the propositions made by the high contracting powers; or if, on the other hand, the Greeks should renounce the conditions stipulated in their favor, the contracting parties would nevertheless continue to prosecute the work of pacification on the basis agreed upon between them; and, in consequence, they author[115]ized, from that time forward, their representatives in London to discuss and determine the ulterior measures to which it might become necessary to resort.

The Greeks accepted the proffered mediation of the three powers, which the Turks rejected, and instructions were given to the commanders of the allied squadrons to compel the cessation of hostilities. This was effected by the result of the battle of Navarino, with the occupation of the Morea by French troops; and the independence of the Greek State was ultimately recognized by the Ottoman Porte, under the mediation of the contracting powers. If, as some writers have supposed, the Turks belong to a family or set of nations which is not bound by the general international law of Christendom, they have still no right to complain of the measures which the Christian powers thought proper to adopt for the protection of their religious brethren, oppressed by the Mohammedan rule. In a ruder age, the nations of Europe, impelled by a generous and enthusiastic feeling of sympathy, inundated the plains of Asia to recover the holy sepulchre from the possession of infidels, and to deliver the Christian pilgrims from the merciless oppressions practised by the Saracens. The Protestant princes and States of Europe, during the sixteenth and seventeenth centuries, did not scruple to confederate and wage war, in order to secure the freedom of religious worship for the votaries of their faith in the bosom of Catholic

communities, to whose subjects it was denied. Still more justifiable was the interference of the Christian powers of Europe to rescue a whole nation, not merely from religious persecution, but from the cruel alternative of being transported from their native land, or exterminated by their merciless oppressors. The rights of human nature wantonly outraged by this cruel warfare, prosecuted for six years against a civilized and Christian people, to whose ancestors mankind are so largely indebted for the blessings of arts and of letters, were but tardily and imperfectly vindicated by this measure. 'Whatever,' as Sir James Mackintosh said, 'a nation may lawfully defend for itself, it may defend for another people, if called upon to interpose.' The interference of the Christian powers, to put an end to this bloody contest might, therefore, have been safely rested upon this ground alone, without appealing to the interests of commerce and of the repose of Europe, which, as well as the interests of humanity, are [116] alluded to in the treaty, as the determining motives of the high contracting parties.^(a)³⁷

§ 70. We have already seen, that the relations which have prevailed between the Ottoman Empire and the other European States have only recently brought the former within the pale of that public law by which the latter are governed, and which was originally founded on that community of manners, institutions, and religion, which distinguish the nations of Christendom from those of the Mohammedan world.^(a) Yet the integrity and independence of that empire have been considered essential to the general balance of power, ever since the crescent ceased to be an object of dread to the western nations of Europe. The above-mentioned interference of three of the great Christian powers in the affairs of Greece had been complicated, by the separate war between Russia and the Ottoman Empire, which was terminated by the treaty of Adrianople, in 1829, followed by the treaty of alliance between the two empires, of Unkiar-Skelessi, in 1833. The

Interference of Austria, Great Britain, Prussia, and Russia, in the internal affairs of the Ottoman Empire, in 1840.

(a) Another treaty was concluded at London, between the same three powers, on the 7th of May, 1832, by which the election of Prince Otho of Bavaria, as King of Greece, was confirmed, and the sovereignty and independence of the new kingdom guaranteed by the contracting parties, according to the terms of the protocol signed by them on the 3d of February, 1830, and accepted by Greece and the Ottoman Porte.

[³⁷ The treaty of London of Nov. 20, 1852, between Great Britain, Russia, France, Bavaria and Greece, admits the binding force of the article in the Greek Constitution which requires the successors to the throne to profess the religion of the Greek Church. On the abdication of King Otho, in 1862, the Bavarian dynasty was set aside, and the Greeks permitted to elect a successor, though upon the nomination of the three powers who guaranty the independence of Greece,—Great Britain, Russia, and France. After some diplomacy, which very nearly resulted in the abrogation of the self-denying clause of the original treaty, by which no member of the reigning family of those powers should ascend the throne, that agreement was adhered to, and the almost unanimous election of Prince Alfred of England was declined. The choice then fell upon Prince George of Denmark, who accepted the throne. The cession of the Ionian Islands to Greece by Great Britain, with the assent of the parties to the treaties of 1827 and 1832 and of the legislature of the islands, is noticed *supra*, note 20 to § 35.]—D.

(a) *Vide supra*, note 8 to § 13.

casus fœderis of the latter treaty was brought on by the attempts of Mehemet Ali, Pacha of Egypt, to assert his independence, and of the Porte, which sought to recover its lost provinces. The *status quo*, which had been established between the Sultan and his vassal by the arrangement of Kutayah, in 1833, under the mediation of France and Great Britain, on which the peace of the Levant depended, and [117] with it the peace of Europe was supposed to depend, was thus constantly threatened by the irreconcilable pretensions of the two great divisions of the Ottoman Empire. The war again broke out between them in 1839, and the Turkish army was overthrown in the decisive battle of Nezib, which was followed by the desertion of the fleet to Mehemet Ali, and by the death of Sultan Mahmoud II.

In this state of things, the western powers of Europe thought they perceived the necessity of interfering to save the Ottoman Empire from the double danger with which it was threatened; by the aggressions of the Pacha of Egypt on one side, and the exclusive protectorate of Russia on the other. A long and intricate negotiation ensued between the five great European powers, from the voluminous documents relating to which the following general principles may be collected, as having received the formal assent of all the parties to the negotiations, however divergent might be their respective views as to the application of those principles.

1. The right of the five great European powers to interfere in this contest was placed upon the ground of its threatening, in its consequences, the general balance of power and the peace of Europe. The only difference of opinion arose as to the means by which the desirable end of preventing all future conflict between the two contending parties could best be accomplished.

2. It was agreed that this interference could only take place on the formal application of the Sultan himself, according to the rule laid down by the Congress of Aix-la-Chapelle, in 1818, that the five great powers would never assume jurisdiction over questions concerning the rights and interests of another power, except at its request, and without inviting such power to take part in the conference.

3. The death of Sultan Mahmoud being imminent, and the dangers of the Ottoman Empire having increased by a complication of disasters, each of the five powers declared its determination to maintain the independence of that empire, under the reigning dynasty; and as a necessary consequence of this determination, that neither of them should seek to profit by the present state of things to obtain an increase of territory or an exclusive influence.

The negotiations finally resulted in the conclusion of the convention of the 15th July, 1840, between four of the great European powers, Austria, Great Britain, Prussia, and Russia, to which the Otto-

man Porte acceded, and in consequence of which Mehemet Ali was compelled to relinquish the possession of all the provinces held by him, except Egypt, the hereditary pachalic of which was confirmed to him, according to the conditions contained in the separate article of the convention.^(b)³⁸

[119] § 71. The interference of the five great European powers represented in the conference of London, in the Belgic Revolution of 1830, affords an example of the application of this right to preserve the general peace, and to adapt the new order of things to the stipulations of the treaties of Paris and Vienna, by which the kingdom of the Nether-

Interference of the five great European powers in the Belgic Revolution of 1830.

(b) Wheaton's Hist. Law of Nations, 563-583.

[³⁸ *Intervention in the Ottoman Empire.*—The moving causes of intervention in the affairs of the Ottoman Empire were the apprehension that Russia would gain a formidable preponderance in Europe, if she became, substantially if not in form, the mistress of the Black Sea and the Dardanelles, and the great interest of England to preserve the existence of a neutralized and guaranteed power in Egypt and the Levant with reference to her Indian empire. In the controversy between Turkey and Russia in 1853-54, which arose in part out of the claim of the Czar to a protectorate over the Christian subjects of the Sultan, and resulted in the Crimean war, Great Britain and France intervened on the side of Turkey, as parties to the treaties for guarantying her independence. Sardinia afterwards joined the alliance. The result of the war was the treaty of Paris of March 30, 1856, between Great Britain, France, Russia, Austria, Prussia, Sardinia, and Turkey. Article VII of this treaty declares the Sublime Porte 'admise à participer aux avantages du droit public et du concert Européens;' and all the parties promise to respect the independence and territorial integrity of the Ottoman Empire; and they declare any act in derogation of the same to be a matter of general interest. By Article VIII, it is agreed, that, if any dispute shall arise between either of the parties and Turkey, menacing their peaceful relations, an opportunity for mediation shall be given to the other powers. Article IX refers to the firman of the Sultan, of Feb. 18, 1856, securing civil equality to his Christian subjects, as a spontaneous offer by the Sultan; and the parties disclaim any right to interfere between the Sultan and his subjects, or in the internal affairs of his empire. By Articles XI-XIV, the Black Sea is neutralized, and open to the commerce of the world; but closed against vessels of war, except a limited force of Russia and Turkey, for coast-service. By Articles XV-XIX, the Danube is thrown open to commerce, on the principle of a river common to several independent nations. Articles XX-XXVI alter the limits of Bessarabia, with the view of depriving Russia of the control of the mouths of the Danube, which are now included in the provinces of Moldavia and Wallachia, guaranteed by Articles XXI-XXVII. Servia is placed under similar guaranties by Articles XXVIII and XXIX. The boundaries in Asia of Russia and Turkey are to be maintained, and, if necessary, to be traced by a mixed commission.

By a treaty between Great Britain, France, and Austria, signed at Paris on the 15th April, 1856, those powers guaranty jointly and severally the independence and integrity of the Ottoman Empire, as recorded in the treaty of Paris of 30 March, 1856, and agree that they will consider any infraction of the stipulations of that treaty as a *casus belli*.

(¹) A supplementary treaty of Paris, of March 30, 1856, between Great Britain, France, Russia, Prussia, and Austria, as parties to the treaty of London of 13 July, 1841, and Sardinia as a new party, on the one part, and the Sultan on the other, the Sultan agrees to adhere to the rule of excluding all vessels of war from the Dardanelles while he is at peace, except such as the treaty powers shall agree to maintain at the mouths of the Danube, to preserve their neutrality, and the small vessels agreed upon between Russia and the Sultan, with the consent of the other powers, for coast-service in the Black Sea; and with the reservation of a right to give licenses to light vessels of war in the service of foreign legations. On the same day (March 30, 1856), the Czar and the Sultan made a convention, fixing the armament and tonnage of the vessels each might employ for coast-service in the Black Sea. By Article XIV of the great treaty, this latter convention cannot be altered but by consent of the parties to that treaty.]—D.

[¹ *Insert word By before words A supplementary treaty. . .*].—G.G.W.

lands had been created. We have given, in another work, a full account of the long and intricate negotiations relating to the separation of Belgium from Holland, which assumed alternately the character of a pacific mediation and of an armed intervention, according to the varying circumstances of the contest, and which was finally terminated by a compromise between the two great opposite principles which so long threatened to disturb the established order and general peace of Europe. The Belgic Revolution was recognized as an accomplished fact, whilst its legal consequences were limited within the strictest bounds, by refusing to Belgium the attributes of the rights of conquest and of postliminy, and by depriving her of a great part of the province of Luxembourg, of the left bank of the Scheldt, and of the right bank of the Meuse. The five great powers, representing Europe, consented to the separation of Belgium from Holland, and admitted the former among the independent States of Europe, upon conditions which were accepted by her and have become the bases of her public law. These conditions were subsequently incorporated into a definitive treaty, concluded between Belgium and Holland in 1839, by which the independence of the former was finally recognized by the latter.^(a)

§ 72. Every State, as a distinct moral being, independent of every other, may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other States. Among these is that of establishing, altering, or abolishing its own municipal constitution of government. No foreign State can lawfully interfere with the exercise of this right, unless such interference is authorized by some special compact, or by such a clear case of necessity as immediately affects its own independence, freedom, and security. Non-interference is the general rule, to which cases of justifiable interference form exceptions limited by the necessity of each particular case.³⁹

§ 73. The approved usage of nations authorizes the proposal by one State of its good offices or mediation for the settlement of the intestine dissensions of another State. When such offer is accepted by the contending parties, it becomes a just title for the interference of the mediating power.⁴⁰

(a) Wheaton's Hist. Law of Nations, 538-555.

[³⁹ Heffter asserts that the right of States is, like that of private persons, to fly to the assistance of neighbors whose existence or fundamental rights are threatened. In view of the serious consequences of such interventions, he recommends and urges the duty of amicable mediation, and other measures short of force. He applies this right to civil wars as well as to wars between recognized nations. Europäische Völker. § 46.]—D.

[⁴⁰ *Mediation*.—Publicists have assigned the words 'intervention' and 'interposition' to express the interference of one State in the affairs of another by force, or with force as the known ultimate sanction. Of that character were the interventions of the Holy Alliance, and all those interventions made by the five great powers to control the relations of the States of Europe, usually at first in the form of advice, but with the purpose of using coercion if necessary: as in the war for Greek independence, and in the revolution of Belgium in 1830. But the term 'mediation' is limited to an offer of advice or of assistance in the way of arbitration,

Such a title may also grow out of positive compact [121] previously existing, such as treaties of mediation and guaranty. Of this nature was the guaranty by France and Sweden of the Germanic Constitution at the peace of Westphalia in 1648, the result of the thirty years' war

leaving the acceptance of the offer to the free will of the other party. The Emperor of Russia has several times made such an offer where the United States were concerned. In 1812, he offered to mediate between them and Great Britain; an offer which was accepted by the United States, but declined by the latter power. (Wait's State Papers, ix. 223; President Madison's message, May 25, 1813; Hansard's Debates, xxx. 526.) In this case, he did not offer himself as an arbitrator whose award the parties would agree to accept, but as one who, by permission of the parties, after examining into the causes of the controversy, should give advice and recommendations. Again, he offered himself as an arbitrator in the difference as to the construction of the clause of the treaty of Ghent respecting the restoration of captured slaves. In this case, his offer was accepted, and an award made, which was carried into effect by the convention of July 12, 1822. United States Laws, viii. 282, 344; Martens' Nouveau Recueil, vi. 66.

In 1836, the King of England offered his mediation between France and the United States, when President Jackson had threatened reprisals for the failure of France to pay the indemnities under the convention of July 4, 1831. The offer was accepted by both parties; but the mediation became unnecessary, as France complied with the demand of the United States. Ann. Reg. 1836, i. 327. England again offered mediation between the United States and Mexico in 1847; but the offer was not accepted by either party. There have been instances of offers of mediation in civil wars; but they present cases of such delicacy and difficulty as to have been seldom accepted, or, if accepted, successful. The offer of Great Britain, in 1847, to mediate between the Queen of Portugal and the insurgents, was accepted by the Queen, but the terms suggested by the four powers were rejected by the Junta; and the end was a compulsory demonstration on the part of England, France, and Spain. (Hansard's Debates, xcii.⁽¹⁾ 306, 1291; xciii. 417-466. Annual Register, 1847, p. 346.) In 1849, France and England offered mediation between the King of Naples and his Sicilian subjects; but it was declined by the Sicilians, and they were left to be subjugated by the king. Annuaire, 1849, p. 615. In 1856, France and England remonstrated with the King of the Two Sicilies for the unfair trials and cruel treatment of political prisoners. The king taking offence at this, those powers withdrew their legations, and sent a naval force to give instant protection to their subjects and property within the kingdom, if they should be in peril. The Russian Government protested against this course, as an attempt to coerce a sovereign in the management of the internal affairs of his State. (Annual Register, 1856, p. 234. Martens' Nouveau Recueil, xv. 759.)

During the civil war in the United States, Russia made to the government an offer of its friendly offices to put an end to the war; but, upon the theory of preserving the integrity of the Union. (Prince Gortschakoff to Baron Stoeckl, July 10, 1861.) Mr. Seward acknowledged the offer and expressed the satisfaction with which the President regarded this new proof of the long friendship between the two countries, but expressed no intention to accept it. The French Government afterwards asked the attention of England and Russia to a joint offer of mediation. The British Government thought it not expedient to take any step in that direction at that time. The Russian Government apprehended that the proposed joint action would have the appearance in the United States of pressure, and would excite fears of intervention. The French Government, however, by a despatch of M. Drouyn de l'Huys⁽¹¹⁾ to M. Mercier, of Jan. 9, 1863, offered to place itself at the disposal of the belligerent parties to facilitate negotiations between them. This was declined by Mr. Seward, in a despatch to Mr. Dayton, of Feb. 6, 1863; and the European powers became satisfied that any further offers of mediation would not be regarded by the United States as prompted by a friendly spirit. Circular of the French Minister of Foreign Affairs, of Oct. 30, 1862. Earl Russell to Earl Cowley, Nov. 18, 1862. The Emperor's address to the Legislative Chambers, Jan. 12, 1863. Le Livre Jaune, 1863. M. Drouyn de l'Huys⁽¹¹⁾ to M. Mercier, Jan. 9, 1863. Mr. Seward to Mr. Dayton, Feb. 6, 1863. Mr. Dayton to Mr. Seward, Feb. 26, 1863. U. S. Dipl. Corr. 1863, i.]—D.

[¹ For Debates, xcii. read Debates, 3d series, xcii.]—G.G.W.

[¹¹ For l'Huys read Lhuys.]—G.G.W.

waged by the princes and States of Germany for the preservation of their civil and religious liberties against the ambition of the House of Austria.

The Republic of Geneva was connected by an ancient alliance with the Swiss Cantons of Berne and Zurich, in consequence of which they united with France, in 1738, in offering the joint mediation of the three powers to the contending political parties by which the tranquillity of the Republic was disturbed. The [122] result of this mediation was the settlement of a constitution, which giving rise to new disputes in 1768, they were again adjusted by the intervention of the mediating powers. In 1782, the French government once more united with these Cantons and the court of Sardinia in mediating between the aristocratic and democratic parties; but it appears to be very questionable how far these transactions, especially the last, can be reconciled with the respect due, on the strict principles of international law, to the just rights and independence of the smallest, not less than to those of the greatest States.^(a)

The present constitution of the Swiss Confederation was also adjusted, in 1815, by the mediation of the great allied powers, and subsequently recognized by them at the Congress of Vienna as the basis of the federative compact of Switzerland. By the same act the united Swiss Cantons guaranty their respective local constitutions of government.^(b)

So also the local constitutions of the different States composing the Germanic Confederation may be guaranteed by the Diet on the application of the particular State in which the constitution is established; and this guaranty gives the Diet the right of determining all controversies respecting the interpretation and execution of the constitution thus established and guaranteed.^(c)

And the Constitution of the United States of America guarantees to each State of the federal Union a republican form of government, and engages to protect each of them against invasion, and, on application of the local authorities, against domestic violence.^(d)

§ 74. This perfect independence of every sovereign State, in respect to its political institutions, extends to the choice of the supreme magistrate and other rulers, as well as to the form of government itself. In hereditary governments, the succession to the crown being regulated by the fundamental laws, all disputes respecting the succession are rightfully settled by the nation itself, independently of the interference or control of foreign powers. So also in elective [123] governments, the choice of the chief or other magistrates ought to be freely made, in the

(a) Flassan, *Histoire de la Diplomatie française*, tom. v. p. 78, tom. vii. pp. 27, 297.

(b) *Acte Final du Congrès de Vienne*, art. 74.

(c) *Wiener Schlussacte*, vom 15 Mai, 1820, art. 62.⁽¹⁾ *Corpus Juris Germanici*, von Mayer,⁽¹¹⁾ tom. ii. p. 196.

(d) *Constitution of the United States*, art. 3.⁽¹¹¹⁾

[¹ For art. 62 read art. 60.]—G.G.W.

[¹¹¹ For art. 3 read art. 4, sec. 4.]—G.G.W.

[¹¹ For Mayer read Meyer.]—G.G.W.

nanner prescribed by the constitution of the State, without the intervention of any foreign influence or authority.(a)

§ 75. The only exceptions to the application of these general rules arise out of compact, such as treaties of alliance, guaranty, and mediation, to which the State itself whose concerns are in question has become a party; or formed by other powers in the exercise of a supposed right of intervention growing out of a necessity involving their own particular security, or some contingent danger affecting the general security of nations. Such, among others, were the wars relating to the Spanish succession, in the beginning of the eighteenth century, and to the Bavarian and Austrian successions, in the latter part of the same century. The history of modern Europe also affords many other examples of the actual interference of foreign powers in the choice of the sovereign or chief magistrate of those States where the choice was constitutionally determined by popular election, or by an elective council, such as in the cases of the head of the Germanic Empire, the King of Poland, and the Roman Pontiff; but in these cases no argument can be drawn from the fact to the right. In the particular case, however, of the election of the Pope, who is the supreme pontiff of the Roman Catholic Church, as well as a temporal sovereign, the Emperor of Austria, and the Kings of France and Spain have, by ancient usage, each a right to exclude one candidate.(a)

Exceptions growing out of compact or other just right of intervention.

§ 76. The quadruple alliance, concluded in 1834 between France, Great Britain, Spain, and Portugal, affords a remarkable example of actual interference in the questions relating to the succession to the crown in the two latter kingdoms, growing out of compacts to which they were parties, formed in the exercise of a supposed right of interference for the preservation of the peace of the Peninsula as well as the general peace of Europe. Having already stated in another work the historical circumstances which gave rise to the quadruple alliance, as well as its terms and conditions, it will only be necessary here to recapitulate the leading principles, which [124] may be collected from the debate in the British Parliament, in 1835, upon the measures adopted by the British government to carry into effect the stipulations of the treaty.

Quadruple alliance of 1834 between France, Great Britain, Portugal, and Spain.

1. The legality of the order in council permitting British subjects to engage in the military service of the Queen of Spain, by exempting them from the general operation of the act of Parliament of 1819, forbidding them from enlisting in foreign military service, was not called in question by Sir Robert Peel and the other speakers on the part of the opposition. Nor was the obligation of the treaty of quadruple alliance, by which the British government was bound to furnish arms and the

(a) Vattel, *Droit des Gens*, liv. i. ch. 5, §§ 66, 67.

(a) Klüber, *Droit des Gens Modernes de l'Europe*, Part. II. tit. 1, ch. 2, § 48.

aid of a naval force to the Queen of Spain, denied by them. Yet it was asserted, that without a declaration of war, it would be with the greatest difficulty that the special obligation of giving naval aid could be fulfilled, without placing the force of such a compact in opposition to the general binding nature of international law. Whatever might be the special obligation imposed on Great Britain by the treaty, it could not warrant her in preventing a neutral State from receiving a supply of arms. She had no right, without a positive declaration of war, to stop the ships of a neutral country on the high seas.

2. It was contended that the suspension of the foreign enlistment law was equivalent to a direct military interference in the domestic affairs of another nation. The general rule on which Great Britain had hitherto acted was that of non-interference. The only exceptions admitted to this rule were cases where the necessity was urgent and immediate; affecting, either on account of vicinage, or some special circumstances, the safety or vital interests of the State. To interfere on the vague ground that British interests would be promoted by the intervention, on the plea that it would be for their advantage to see established a particular form of government in Spain, would be to destroy altogether the general rule of non-intervention, and to place the independence of every weak power at the mercy of its formidable neighbors. It was impossible to deny that an act which the British government permitted, authorizing British soldiers and subjects to enlist in the service of a foreign power, and allowing them to be organized in Great Britain, was a recognition of the doctrine of the propriety of assisting by a military force a foreign government against an insurrection of its own subjects. When [125] the Foreign Enlistment Bill was under consideration in the House of Commons, the particular clause which empowered the king in council to suspend its operation was objected to on the ground, that if there was no foreign enlistment act, the subjects of Great Britain might volunteer in the service of another country, and there could be no particular ground of complaint against them; but that if the king in council were permitted to issue an order suspending the law with reference to any belligerent nation, the government might be considered as sending a force under its own control.

Lord Palmerston, in reply, stated:—1. That the object of the treaty of quadruple alliance, as expressed in the preamble, was to establish internal peace throughout the Peninsula, including Spain as well as Portugal; the means by which it was proposed to effect that object was the expulsion of the infants Don Carlos and Dom Miguel from Portugal. When Don Carlos returned to Spain, it was thought necessary to frame additional articles to the treaty in order to meet the new emergency. One of these additional articles engaged His Britannic

Majesty to furnish Her Catholic Majesty with such supplies of arms and warlike stores as Her Majesty might require, and further to assist Her Majesty with a naval force. The writers on the law of nations all agreed that any government, thus stipulating to furnish arms to another, must be considered as taking an active part in any contest in which the latter might be engaged; and the agreement to furnish a naval force, if necessary, was a still stronger demonstration to that effect. If, therefore, the recent order in council was objected to on the ground that it identified Great Britain with the cause of the existing government of Spain, the answer was, that, by the additional articles of the quadruple treaty, that identification had already been established, and that one of those articles went even beyond the measure which had been impugned.

2. As to what had been alleged as to the danger of establishing a precedent for the interference of other countries, he would merely observe that, in the first place, this interference was founded on a treaty arising out of the acknowledged right of succession of a sovereign, decided by the legitimate authorities of the country over which she ruled. In the case of a civil war proceeding either from a disputed succession, or from a prolonged revolt, no writer on international law denied that other countries [126] had a right, if they chose to exercise it, to take part with either of the two belligerent parties. Undoubtedly it was inexpedient to exercise that right except under circumstances of a peculiar nature. That right, however, was general. If one country exercised it, another might equally exercise it. One State might support one party, another the other party; and whoever embarked in either cause must do so with their eyes open to the full extent of the possible consequences of their decision. He contended, therefore, that the measure under consideration established no new principle, and that it created no danger as a precedent. Every case must be judged by the considerations of prudence which belonged to it. The present case, therefore, must be judged by similar considerations. All that he maintained was, that the recent proceeding did not go beyond the spirit of the engagement into which Great Britain had entered, that it did not establish any new principle, and that the engagement was quite consistent with the law of nations.^(a)⁴¹

(a) Wheaton's Hist. Law of Nations, 523-538.

[⁴¹ *Intervention in Mexico. Recognition of the Empire.*—The intervention by France, Spain, and Great Britain in the affairs of Mexico, presents a striking instance of the practice of the European powers in such cases, and will contribute a precedent to international law, at least as against the parties concerned.

A convention was made at London, on the 31st October, 1861, between Great Britain, France, and Spain, professedly for the purpose of obtaining redress and security from Mexico for citizens of the contracting powers. The claim was declared to be, that bonds of the Mexican Government were held by citizens of those countries, for which the Mexican Government had neglected to provide payment, and which it was doubtful if Mexico had either the ability or

willingness to pay. Injuries, it was declared, had been inflicted on citizens of those countries residing in Mexico, in their persons and property, by powers in possession of the government, for which no redress could be obtained. In general, the object of the convention was defined to be, 'to demand more efficacious protection for the persons and property of their subjects, as well as a fulfilment of the obligations contracted towards their Majesties.' The second article of the convention declares that the contracting parties 'engage not to seek for themselves, in the employment of the contemplated coercive measures, any acquisition of territory, or any special advantage, nor to exercise in the internal affairs of Mexico any influence of a nature to prejudice the right of the Mexican nation to choose and constitute the form of its government.' The convention provided for such occupation of territory and 'such other operations' as should be judged suitable to secure its objects.

It is clear that this convention authorized a war of conquest upon Mexico, with no limitation except such as might be afforded by the agreement of the allies to leave the conquered people free to choose and constitute their own form of government. The payment of debts might, indeed, be obtained from the existing government; but the other object—permanent protection for the persons and property of resident foreigners—could, in the opinion of the parties to the convention, be secured only by a change [127] of government. The second article, therefore, assumed that there would be such a change, and declared only that it should be effected by the Mexicans themselves. The convention may, therefore, be said to have contemplated an armed occupation of Mexico, until the people should have adopted such a government as, in the opinion of the allies, would be responsible and stable.

Provision was made in the treaty for the accession of the United States, as a fourth party; but it was to become a party to a treaty the terms of which the other parties had already settled, and even after its execution had been begun. The note from the three powers, inviting the United States to join, was dated a month after the date of the treaty. The United States were sensitive to the intervention of European monarchies in the internal affairs of a neighboring republic on the American continent; and the Secretary of State, Mr. Seward, endeavored to remove the more definite and specific occasion for the enterprise by an arrangement with Mexico, by which the United States should give her such aid as would enable her to discharge the just pecuniary demands of the three powers. The United-States Minister at Mexico was authorized by the President to make a treaty to that effect. In Mr. Seward's reply (bearing date Dec. 4, 1861) to the note from the three powers, inviting the co-operation of the United States, he informs them of this contemplated arrangement, and expresses the hope that it will remove the necessity for the proposed intervention. This was immediately rejected as unsatisfactory by each of the three powers. (Earl Cowley to Earl Russell, Sept. 24, 1861. Ditto, Sept. 27, 1861. Sir J. Crampton to Earl Russell, Dec. 15, 1861. Earl Russell to Sir C. Wyke, 30 March, 1861.) It was made plain by these letters, and the diplomatic conversations to which they refer, that the three powers would not be satisfied with the payment of the debts, ascertained and ascertainable, due to their subjects. They insisted on the further object of the convention,—security for the future good treatment of resident foreigners. The correspondence confirms the view that this security could not, in their opinion, be obtained except by a change of government. The Queen's speech (February, 1862), also assigns as a motive for the convention 'the wrongs committed by various parties and by successive governments in Mexico upon various^[1] foreigners resident in Mexico,^[11] and for which no satisfactory redress could be obtained.' The instructions of M. Thouvenel, the French Minister of Foreign Affairs, to the admiral commanding the French fleet in the Gulf of Mexico, say: 'The presence of the forces of the allies on the Mexican territory may lead the better part of the population, fatigued with anarchy and desirous of order and repose, to make an effort to establish in the country a government affording those guaranties of strength and stability which have been wanting in all those that have followed each other since the independence.' Referring then to the great interest the allies have in such a result, he adds, 'That interest induces them not to discourage attempts of the nature of those I have suggested to you; and you ought not to refuse them your encouragement and moral aid, if, by the position of the men who take the initiative in them, and by the sympathy they meet with among the body of the people, they should present chances of success for the institution of such an order of things as would secure to the interests of resident foreigners the protection and guaranties which have hitherto been wanting.' The

[¹ *Omit various.*—G.G.W.]

[¹¹ *For in Mexico read within Mexican territory.*—G.G.W.]

letter concludes with leaving it to the discretion of the admiral and the commissioner to determine 'to what extent you may be called upon to take part in these movements.' The annual statement of the condition of the French Empire, made in January, 1862, to the Legislative Chamber, expresses the satisfaction the French Government will feel if the intervention 'should produce a crisis for Mexico of a nature to favor the recognition of that country.' The most complete exposition of the views of the French emperor is to be found in his letter to General Forey, dated July 3, 1862, directing him to [128] march upon the capital. The motives for French intervention he states to be, to redress grievances; to establish bounds to the extension of the United States further south, and prevent her becoming the sole dispenser of the products of the new world; the restoration of the prestige of the Latin races in America; and the extension of the influence and interest of France by the gratitude and sympathy of a government established through her efforts. He disclaims an intention to force a government on Mexico, yet directs General Forey 'to establish either a monarchy, if it be not incompatible with the national sentiment of the country, or, at all events, a government which promises some stability.' In his letter to Lorencez, the emperor made his celebrated declaration,—'It is contrary to my interests, my origin, and my principles to impose any kind of government upon⁽¹⁾ the Mexican people. They may freely choose that which suits them best.' U. S. Dipl. Corr. 1862, p. 401. Michel Chevalier, however, admits (*Revue des deux Mondes*, April 1, 1862) that the probable expectation of the three powers was 'the overthrow of the system of government established in Mexico since its independence, and the substitution of a monarchical system.' Indeed, the general purposes of indemnity and security for foreign residents furnished to the allies their most tenable position for intervention, if the state of facts warranted it: for it is not the custom for nations to interfere authoritatively in behalf of their citizens who have chosen to lend money to foreign governments; and, in this case, the genuineness of the debts, the amounts actually due, and the liability of Mexico, were matters of very grave doubt.

In Mr. Seward's reply of Dec. 4, 1861 (before referred to), to the invitation to join the alliance, he admits the right of the three powers to judge for themselves whether they have sustained grievances that require them to levy war upon Mexico. He reminds the allies that the United States have a deep interest that the allies shall not acquire territory in Mexico, or gain any advantages in Mexican territory peculiar to themselves; and, especially, that they shall not, 'as a result or consequence of the hostilities to be inaugurated under the convention, exercise, in the subsequent affairs of Mexico, any influence of a character to impair the right of the Mexican people to choose and freely constitute the form of its own government.' Mr. Seward declines, in behalf of the President, joining in any manner in the alliance; and assigns, as reasons for the refusal, the traditional policy of the United States not to join in European political combinations, and the prevailing feeling and interest of the United States in Mexico, as a neighbor, and as having a republican form of government like their own. The claims the United States have against Mexico, they prefer to manage by themselves, and by peaceful means.

As might have been expected from these antecedents, a question soon arose among the allies, as to how far they should go in exercising coercion upon Mexico, and what should be the test and rule of their forcible interference in her internal affairs. At a conference held at Orizaba on the 9th April, 1862, the Spanish and English commissioners, objecting that the French had gone beyond the terms of the convention in giving military aid to the party in favor of establishing an imperial government, withdrew from further co-operation. Their course was approved by their respective governments. The French Government, whose pecuniary claims upon Mexico were much smaller than those of the other powers and more questionable, left to itself in Mexico, proceeded, by military aid to the Imperialist party, to establish that party in possession of the capital; and, under the protection of the French forces, an Assembly of Notables was called, which had been selected and designated by the Imperialist party, without even the pretence of a general vote of the Mexican people; and this Assembly undertook to establish an imperial form of government, and to offer the throne to the Archduke Maximilian of Austria. The Emperor of the [129] French treated this as a conclusive expression of the will of the Mexican people, acknowledged the new sovereign at once, and entered into a treaty with him for military aid to secure his authority.

The position taken by Mr. Seward in 1862 was, that the explanations given by the French emperor to the United States made the French intervention a war upon Mexico for the settle-

[¹ For government upon *read* government whatever on.]—G.G.W.

ment of claims which Mexico had not met to the satisfaction of France. This explanation the United States relied upon, and did not intend to interfere between the belligerents. (Mr. Seward to Mr. Dayton, June 21, 1862; August 23, 1862; and November 10, 1862: U. S. Dipl. Corr. 1862.)

On the 4th of April 1864, the House of Representatives passed a resolution, by unanimous vote, denouncing the French intervention in Mexico; but these resolves were not acted upon by the Senate; and the position of the government continued to be that of recognizing a war made by France upon Mexico for professed international objects of which we did not assume to judge, accompanied with a military occupation of a large part of Mexico by the French, which we recognized as one of the facts of the war. But the government steadily refused to regard the empire as established by the Mexican people, and treated Maximilian as a kind of provisional ruler established by the French, in virtue of their military occupation. Mr. Seward, in his despatch to Mr. Bigelow, the United States Minister to France, of June 30, 1865, says: 'It will be well, at your convenience, to make this explanation to M. Drouyn de l'Huys.'ⁱ—So far as our relations are concerned, what we hold in regard to Mexico is, that France is a belligerent there, in war with the republic of Mexico. We do not enter into the merits of the belligerents, but we practise in regard to the contest the principles of neutrality; as we have insisted on the practice of neutrality by all nations in regard to our civil war. Our friendship towards the republic of Mexico, and our sympathies with the republican system on this continent, as well as our faith and confidence in it, have been continually declared.ⁱⁱ Political intervention in the affairs of foreign States is a principle thus far avoided by our government.' And again, in his despatch of Sept. 6, 1865, he says: 'It is perceived with much regret, that an apparent, if not a real, a future if not an immediate, antagonism between the policies of the two nations [France and the United States] seems to reveal itself in the situation of Mexico.'ⁱⁱⁱ The United States have at no time left it doubtful that they prefer to see a domestic and republican system of government prevail in Mexico, rather than any other system. This preference results from the fact, that the Constitution of the United States itself is domestic and republican; and from a belief, that,^{iv} so far as is practically and justly attainable by the exercise of moral influences, the many American States by which the United States are surrounded should be distinguished by the same peculiarities of government.' Disclaiming for the United States political propagandism or aggrandizement by conquest, he states it as the belief of the American people, that the advance of civilization in this hemisphere is best secured when the political institutions of the other American States assimilate to our own; and adds: 'France appears to us to be lending her great influence, with a considerable military force, to destroy the domestic republican government in Mexico, and to establish there an imperial system, under the sovereignty of a European prince, who, until he assumed the crown, was a stranger to that country. We do not insist or claim that Mexico and the other States on the American continent shall adopt the political institutions to which we are so earnestly attached; but we do hold that the peoples of those countries are entitled to exercise the freedom of choosing and establishing institutions like our own, if they are preferred.' Again, in his despatch of Nov. 6, 1865, he says the United States 'still regard the effort to establish permanently a foreign and imperial government as^v disallowable and impracticable;' and adds that the United States 'are not [130] prepared to recognize, or to pledge themselves hereafter to recognize, any political institutions in Mexico which are in opposition to the republican government with which we have so long and so constantly maintained relations of friendship.'^{vi}

M. Drouyn de l'Huys,^{iv} in a letter of Oct. 18, 1865, to M. de Montholon, the French Minister, communicated to Mr. Seward, says: 'What we ask of the United States is to be assured that their intention is not to impede the consolidation of the new order of things founded in Mexico; and the best guaranty we could receive of their intention would be the recognition of the Emperor Maximilian by the Federal Government.' And again: 'But the acknowledgment of the Emperor Maximilian by the United States would, in our opinion, have sufficient influence upon the state of the country to allow of taking^{vii} into consideration their susceptibilities on this subject; and, should the Cabinet of Washington decide to open diplomatic

ⁱ For l'Huys read Lhuys.]—G.G.W.

ⁱⁱ A sentence is omitted after the word declared.]—G.G.W.

ⁱⁱⁱ After Mexico insert before mentioned.]—G.G.W.

^{iv} A clause is omitted after the word that.]—G.G.W.

^v For government as read government in Mexico as.]—G.G.W.

^{vi} For of friendship read of amity and friendship.]—G.G.W.

^{vii} For of taking read us to take.]—G.G.W.

relations with the Court of Mexico, we should⁽¹⁾ see no difficulty in entering into arrangements⁽¹¹⁾ for the recall of our troops within a reasonable period, of which we might consent to fix the termination.'

Mr. Seward, in a letter of Dec. 6, 1865, to M. de Montholon, in reply to the above, says: 'The effect of the emperor's suggestions, when they are reduced to a practical shape, seems to be this: That France is willing to retire from Mexico as soon as she may, but that it would be inconvenient for her without first receiving from the United States an assurance of a friendly or tolerant disposition to the power which has assumed to itself an imperial form in the capital city of Mexico. The President is gratified by the assurance you have thus given of the emperor's good disposition. I regret, however, to be obliged to say that the condition the emperor suggests is one which seems quite impracticable. . . . I cannot but infer, from the tenor of your communication, that the principal cause of the discontent prevailing in the United States with regard to Mexico is not fully apprehended by the emperor's government. The chief cause is not that there is a foreign army in Mexico; much less does that discontent arise from the circumstance that that foreign army is a French one. We recognize the right of sovereign nations to carry on war with each other, if they do not invade our rights, or menace our safety or just influence. The real cause of our national discontent is, that the French army which is now in Mexico is invading a domestic republican government there, which was established by her people and with whom the United States sympathize most profoundly, for the avowed purpose of suppressing it, and establishing upon its ruins a foreign monarchical government, whose presence there, so long as it should endure, could not but be regarded by the people of the United States as injurious and menacing to their own chosen and endeared republican institutions.' Again disclaiming any purpose of the United States to make a war of propagandism in the republican cause, he adds: 'On the other hand, we have constantly maintained, and still feel bound to maintain, that the people of every State on the American continent have a right to secure for themselves a republican government, if they choose; and that interference by foreign States to prevent the enjoyment of such institutions deliberately established is wrongful, and in its effects antagonistical to the free and popular form of government existing in the United States.' And he expresses the hope that France 'may find it compatible with its interests and high⁽¹²⁾ honor to withdraw from its aggressive attitude in Mexico, within some convenient and reasonable time, and thus leave the people of that country to the free enjoyment of the system of republican government which they have established for themselves.'

In a despatch of Dec. 16, 1865, to Mr. Bigelow, he says: 'It has been the President's purpose that France should be respectfully informed upon two points; namely, first, That the United States earnestly desire to continue and to cultivate sincere friendship with France; second, That this policy would be brought into imminent jeopardy, unless France could deem it consistent with her interest and [131] honor to desist from the prosecution of armed intervention in Mexico to overthrow the domestic republican government existing there, and to establish upon its ruins the foreign monarchy which has been attempted to be inaugurated in the capital of the country.'

In July, 1864, a question was put to Lord Palmerston in Parliament as to the recognition by Great Britain of the Imperial Government of Maximilian. He stated, in reply, that the Archduke, before leaving Europe, applied to Great Britain to recognize his government on the basis of the election; and that the British Government was not inclined to do so, and informed the Archduke that the recognition must depend upon whether the people of Mexico did in fact receive and accept his government, so that it should be actually the established government of Mexico. The election, in the circumstances under which it was made, was not considered proof of a free choice of the Mexican people, in advance; and the actual establishment of the government was matter for the future to decide. Lord Palmerston closed with these words: 'If we find there is a prospect of a government⁽¹³⁾ being established, we shall be very glad to acknowledge it.⁽¹⁴⁾ If, on the other hand, we find matters still uncertain, and a war still going on, which may result one way or the other, we shall say the government is not of a kind that would justify us in acknowledging the Archduke as Emperor of Mexico.' Lord Palmerston

⁽¹⁾ For should read would.]—G.G.W.

⁽¹¹⁾ For in entering into arrangements read to enter in arrangement.]—G.G.W.

⁽¹²⁾ For its interests and high read its best interests and its high.]—G.G.W.

⁽¹³⁾ For a government read a permanent government.]—G.G.W.

⁽¹⁴⁾ A clause is omitted after the word it.]—G.G.W.

stated the earnest desire of Great Britain to see a stable and responsible government in Mexico, instead of the anarchy and successions of military chiefs, holding by conquest, on short and uncertain terms of office, which had prevailed for many years past.

A proposal having been made to the United States Government to receive a commissioner from the new empire, to make an arrangement respecting the recognition of consuls in the United States from the imperial government, Mr. Seward replied: 'It is a fixed habit of this government to hold no official intercourse with agents of parties in any country which stand in an attitude of revolution antagonistic to the sovereign authority in the same country with which the United States are on terms of friendly diplomatic intercourse. It is equally a fixed habit of this government to hold no unofficial or private interviews with persons with whom it cannot hold official intercourse.' (Mr. Seward's memoranda of March 13 and July 17, 1865: Ex. Doc.⁽¹⁾ No. 20, 39th Cong. 1st Sess.) In August, 1865, the Minister of the Mexican Republic represented to the Department of State that a commercial agent of Maximilian in New York was attempting to exercise the duties of a consul by giving certificates of invoices and manifests, and inquired whether he was recognized by the United States. Mr. Seward replied that no other than the Republican Government in Mexico was recognized, but added: 'You are aware, however, that the party in arms against that government is, and for some time past has been, in possession of some, at least, of the ports of Mexico. That possession carries with it, for the time being, a power to prescribe the terms upon which foreign commerce may be carried on with those ports. If, as is presumed to be the case, one of those conditions is that the invoices and manifests of vessels from abroad bound to those ports must be certified by a commercial agent of the party in possession, residing in the port of the foreign country from which the vessel may proceed, it is not perceived what effective measures this government could properly take in the premises. Such a commercial agent can perform no consular act relating to the affairs of his countrymen in the United States. To prohibit him from attesting invoices and manifests under the circumstances referred to, would be tantamount to an interdiction of trade between the United States and those Mexican ports which are not in possession of the Republican Government of that country. The consuls of the United States in Mexico, who have their exequaturs from that government only, themselves discharge duties as commercial agents, in the ports which are not under the control of that government, in all respects like those which the person Arroyo, in the same way and to the same extent, claims to do at New York in respect to said ports.' Mr. Seward to Señ. Romero, Aug. 9, 1865.]—D.

CHAPTER II

RIGHTS OF CIVIL AND CRIMINAL LEGISLATION

Exclusive
power of
civil legis-
lation.

§ 77. EVERY independent State is entitled to the exclusive power of legislation, in respect to the personal rights and civil state and condition of its citizens, and in respect to all real and personal property situated within its territory, whether belonging to citizens or aliens. But as it often happens that an individual possesses real property in a State other than that of his domicile, or that contracts are entered into and testaments executed by him, or that he is interested in successions *ab intestato*, in a country different from either; it may happen that he is, at the same time, subject to two or three sovereign powers; to that of his native country or of his domicile, to that of the place where the property in question is situated, and to that of the place where the contracts have been made or the acts executed. The allegiance to the sovereign power of his native country exists from the birth of the

[¹ For Ex. Doc. read House Ex. Doc.]—G.G.W.

individual, and continues till a change of nationality.⁴² In the two other cases he is considered subject to the laws, but only in a limited sense. In the foreign countries, where he possesses real property, he is called a non-resident land owner, (*sujet forain*); in those in which the contracts are entered into, a temporary resident, (*sujet passager*). As, in general, each of these different countries is governed by a distinct legislation, conflicts between their laws often arise; that is to say, it is frequently a question which system of laws is applicable to the case. The collection of rules for determining the conflicts between the civil and criminal laws of different States, is called private international law, Private international law. to distinguish it from public international law, which regulates the relations of States.^(a)⁴³

[133] § 78. The first general principle on this subject results immediately from the fact of the independence of nations. Every nation possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory. It follows, from this principle, that the laws of every State control, of right, all the real and personal property within its territory, as well as the inhabitants of the territory, whether born there or not, and that they affect and regulate all the acts done, or contracts entered into within its limits.⁽ⁱ⁾ Conflict of laws.

Consequently, 'every State possesses the power of regulating the conditions on which the real or personal property, within its territory, may be held or transmitted; and of determining the state and capacity of all persons therein, as well as the validity of the contracts and other acts which arise there, and the rights and obligations which result from them; and, finally, of prescribing the conditions on which suits at law may be commenced and carried on within its territory.'^(a)

The second general principle is, 'that no State can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not. This is a consequence of the first general principle; a different system, which would recognize in each State the power of regulating persons or things beyond its territory, would exclude the equality of rights among different States, and the exclusive sovereignty which belongs to each of them.'^(b)

From the two principles, which have been stated, it follows that all the effect, which foreign laws can have in the territory of a State, depends absolutely on the express or tacit consent of that State. A State is not obliged to allow the application of foreign laws within its

[⁴² See note on the subject of Naturalization, *infra*, No. 49.]—D.

(a) Foelix, Droit International Privé, § 3.

[⁴³ Story's Conflict of Laws, §§ 9, 10, 11. Kent's Com. ii. 39.]—D.

(a) Foelix, Droit Int. Privé, § 9.

(b) *Id.* § 10.

[¹ This paragraph is a translation of Foelix, Droit Int. Privé, par. 1, § 9.]—G.G.W.

territory, but may absolutely refuse to give any effect to them. It may pronounce this prohibition with regard to some of them only, and permit others to be operative, in whole or in part. If the legislation of the State is positive either way, the tribunals must necessarily conform to it. In the event only of the law being silent, the courts may judge, in the particular cases, how far to follow the foreign laws, and to apply their provisions. The express consent of a State, to the application of foreign laws within its territory, is given by acts passed by [134] its legislative authority, or by treaties concluded with other States. Its tacit consent is manifested by the decisions of its judicial and administrative authorities, as well as by the writings of its publicists.⁴⁴

§ 79. There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States—*ex comitate, ob reciprocam utilitatem*. The public good and the general interests of nations have caused to be accorded, in every State, an operation more or less extended to foreign laws. Every nation has found its advantage in this course. The subjects of every State have various relations with those of other States; they are interested in the business transacted and in the property situate abroad. Thence flows the necessity, or at least utility, for every State, in the proper interest of its subjects, to accord certain effects to foreign laws, and to acknowledge the validity of acts done in foreign countries, in order that its subjects may find in the same countries a reciprocal protection for their interests. There is thus formed a tacit convention among nations for the application of foreign laws, founded upon reciprocal wants. This understanding is not the same everywhere. Some States have adopted the principle of complete reciprocity, by treating foreigners in the same manner as their subjects are treated in the country to which they belong; other States regard certain rights to be so absolutely inherent in the quality of citizens as to exclude foreigners from them; or they attach such an importance to some of their institutions, that they refuse the application of every foreign law incompatible with the spirit of those institutions. But, in modern times, all States have adopted, as a principle, the application within their territories of foreign laws; subject, however, to the restrictions which the rights of sovereignty and the interests of their own subjects require. This is the doctrine professed by all the publicists who have written on the subject.

⁴⁴ Story's Conflict of Laws, §§ 17-22. Boullenois, *Traité des Statuts*, i. 2, 3, 4, 152. Henry on Foreign Law, Part I. ch. 1, § 1. Huberus, lib. i. tit. 3, § 2. Vattel, Part II.⁽¹⁾ ch. 7, §§ 84, 85. Rodenburg de Stat. ch. 3, § 1, p. 7. Voet de Stat. ch. 2, § 4,⁽¹¹⁾ n. 7, pp. 124, 138, 139. *Bank of Augusta v. Earle*, Peters's Rep. xiii. 584-591. *Blanchard v. Russell*, Mass. Rep. xiii. 4. Henry on Statutes, Part I. ch. 1, p. 1.]—D.

[¹ For Part II read Bk. II.]—G.G.W.

[¹¹ For ch. 2, § 4 read § 4, ch. 2.]—G.G.W.

'Above all things,' says President Bohier,⁽¹⁾ 'we must remember [135] that, though the strict rule would authorize us to confine the operation of laws within their own territorial limits, their application has, nevertheless, been extended, from considerations of public utility, and oftentimes even from a kind of necessity. But, when neighboring nations have permitted this extension, they are not to be deemed to have subjected themselves to a foreign statute; but to have allowed it, only because they have found in it their own interest by having, in similar cases, the same advantages for their own laws among their neighbors. This effect given to foreign laws is founded on a kind of comity of the law of nations; by which different peoples have tacitly agreed that they shall apply, whenever it is required by equity and common utility, provided they do not contravene any prohibitory enactment.'^(a)

§ 80. Huberus, one of the earliest and best writers on this subject, lays down the following general maxims, as adequate to solve all the intricate questions which may arise respecting it:—

1. The laws of every State have force within the limits of that State, and bind all its subjects.
2. All persons within the limits of a State are considered as subjects, whether their residence is permanent or temporary.
3. By the comity of nations, whatever laws are carried into execution within the limits of any State, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of other States and their citizens.

From these maxims, Huberus deduces the following general corollary, as applicable to the determination of all questions arising out of the conflict of the laws of different States, in respect to private rights of persons and property.

All transactions in a court of justice, or out of court, whether testamentary or other conveyances, which are regularly done or executed according to the law of any particular place, are valid, even where a different law prevails, and where, had they been so transacted, they would not have been valid. On the other hand, transactions and instruments which are done or executed contrary to the laws of a country, as they are void at first, never can be valid; and this applies not only to those who permanently reside in the place where the transaction or instrument is done or executed, but to those who reside there only temporarily; with this exception only, that if another State, or its citizens, would be [136] affected by any peculiar inconvenience of an important nature, by giving this effect to acts performed in another

(a) Bohier,⁽¹⁾ *Observations sur la Coutume de Bourgogne*, ch. 23, §§ 62, 63, p. 457.

[¹ For Bohier read Bouhier.]—G.G.W.

country, that State is not bound to give effect to those proceedings, or to consider them as valid within its jurisdiction.^(a)⁴⁵

Lex loci
rei sitæ.

§ 81. Thus, real property is considered as not depending altogether upon the will of private individuals, but as having certain qualities impressed upon it by the laws of that country where it is situated, and which qualities remain indelible, whatever the laws of another State, or the private dispositions of its citizens, may provide to the contrary. That State, where this real property is situated, cannot suffer its own laws in this respect to be changed by these dispositions, without great confusion and prejudice to its own interests. Hence it follows, that the law of a place where real property is situated governs exclusively as to the tenure, the title, and the descent of such property.^(a)

This rule is applied, by the international jurisprudence of the United States and Great Britain, to the forms of conveyance of real property, both as between different parts of the same confed[er]ation or empire, and with respect to foreign countries. Hence it is that a deed or will of real property, executed in a foreign country, or in another State of the Union, must be executed with the formalities required by the laws of that State where the land lies.^(b)

But this application of the rule is peculiar to American and British law. According to the international jurisprudence recognized among the different nations of the European continent, a deed or will, executed

(a) Huberus, *Prælect. tom. ii. lib. i. tit. 3, de Conflictu Legum.*

^[45] On the subject of comity, see Judge Redfield's edition of Story's *Conflict of Laws*, § 38 *a*. The learned editor offers a suggestion, that the policy of each nation must determine whether it will give judicial remedies for breaches of obligation committed abroad, and what is called comity may enter into that question; but, if the remedies are allowed, the court must necessarily learn and apply the law of the foreign country, in order to understand the rights and duties of the parties. This is not, he says, of comity, but of necessity.

On the general subjects treated of in these sections, see Savigny's *System*, l. viii. Mohl's *Gesch. und Liter. i. 441*. Story's *Conflict of Laws*, §§ 23-32. *Dalrymple v. Dalrymple*, Hagg. Cons. Rep. ii. 59. Fergusson on *Marriage and Divorce*,⁽¹⁾ 395, 410. Hertii *Opera*, de *Coll. Leg.* 120, 123, 170, 171. Boullenois, *Traité des Stat.* I. 2, 3, 4, and 6;⁽²⁾ 3 Ob. 10, p. 152, 155; ii. App. p. 8. Livermore on *Contr. of Laws*,⁽³⁾ 28. Kent's *Comm.* ii. 457. Henry on *Foreign Law*, Part I. ch. 1, § 1. Rodenburg de *Stat. ch. 3, § 1, p. 7*. Bank of *Augusta v. Earle*, Peters's Rep. xiii. 584. Blanchard v. Russell, Mass. Rep. xiii. 4. Saul v. His Creditors, Martin's Rep. xvii. 569-596.]—D.

(a) 'Fundamentum universæ hujus doctrinæ diximus esse, et tenemus, subjectionem hominum infra leges cujusque territorii, quamdiu illic agunt, quæ facit ut actus ab initio validus aut nullus, alibi quoque valere aut non valere non nequeat. Sed hæc ratio non convenit rebus immobilibus, quando illæ spectantur, non ut dependentes à liberâ dispositione cujusque patris-familias, verum quatenus certæ notæ lege cujusque reipublicæ ubi sitæ sunt, illis impressæ reperiuntur; hæ notæ manent indelebiles in istâ reipublicâ, quidquid aliarum civitatum leges, aut privatorum dispositiones, secus aut contra statuunt; nec enim sine magnâ confusione prejudicioque reipublicæ ubi sitæ sunt res soli, leges de illis latæ, dispositionibus istis mutari possunt.' Huberus, liv. i. tit. 3, de *Conflictu Leg.* § 15.

(b) Wheaton's Rep. iii. 212. Robinson v. Campbell. Cranch's Rep. vii. 115. United States v. Crosby.

^[1] Insert Consistorial Reports, after *Divorce*,.]—G.G.W.

^[2] Insert ch. before 3 Ob. 10.]—G.G.W.

^[3] For *Contr. of Laws* read *Contrariety of the Positive Laws of Different States and Nations.*]—G.G.W.

according to the law of the place where it is made, is valid; not only as to personal, but as to real property, wherever situated; provided the property is allowed by the *lex loci rei sitæ* to be alienated by deed or will; and those cases excepted, where that law prescribes, as to instruments for the transfer of real property, particular forms, which can only be observed in the place where it is situated, such as the registry of a deed or the probate of a will.^(c)⁴⁶

[138] § 82. The municipal laws of all European countries formerly prohibited aliens from holding real property within the territory of the State. During the prevalence of the feudal system, the acquisition of property in land involved the notion of allegiance to the prince within whose dominions it lay, which might be inconsistent with that which the proprietor owed to his native sovereign. It was also during the same rude ages that the *jus albinagii* or *droit d'aubaine* was established; by

(c) Fœlix, *Droit International Privé*, § 52.⁽¹⁾ 'Hinc Frisius habens agros et domos in provincia Groningensi, non potest de illis testari, quia lege prohibitum est ibi de bonis immobilibus testari, non valente jure Frisco adficere bona, quæ partes alieni territorii integrantes constituunt. Sed an hoc non obstat ei, quod antea diximus, si factum sit testamentum jure loci validum, id effectum habere etiam in bonis alibi sitis, ubi de illis testari licet? Non obstat; quia legum diversitas in illâ specie non afficit res soli, neque de illis loquitur, sed ordinat actum testandi; quo recte celebrato, lex Reipublicæ non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a lege loci impressus læditur aut imminuitur.' Huberus, ubi supra.⁽¹¹⁾

[⁴⁶ Story's Conflict of Laws, §§ 424, 434, 448. Burge on Col. and For. Laws, ii. 840-870; ⁽¹¹¹⁾ iv. 150, 576. Fœlix, *Confit des Lois*, 216-230, 307-312, 346-7, 350-4. As to liens on immovable property, see Boullenois, i. ^(1v) 683-689, 818; Rodenburg de Stat. tit. ii. ch. 5, § 16; and note 4 to Story's Conflict of Laws, § 424. 'No one maintains that a form expressly imposed as an exclusive one by the *lex situs* can ever be dispensed with.' Westlake's Pr. Intern. Law, § 87. The French law of March, 1855, requires the transfer *inter vivos* of real property and of corporeal personal property to be recorded in the Bureau of Hypothecations.

The general rules as to the transfer of immovable property *inter vivos*, on which the greatest agreement among the courts and jurists is found, are that the *lex loci rei sitæ* must govern in determining—I. The disposition of immovable property (real estate); II. The personal capacity to take or to transfer immovable property; III. The formalities of passing title to immovable property; IV. The extent of the dominion over immovable property; V. The question what is and what is not real estate. These questions are found discussed at great length, with the latest authorities, in Redfield's edition of Story's Conflict of Laws, ch. 10, §§ 424-454.

As to wills of immovable property, the rules most generally adopted are that the *lex loci rei sitæ* must govern in determining—I. The capacity or incapacity of the testator; II. The extent of the testator's power to dispose of the property; III. The forms and solemnities necessary to give the will its due attestation and effect. If a will is made in execution of a power, it is valid if made in conformity with the law governing the granting of the power. The law of the testator's domicile governs in determining—I. The construction of the will, as to whether it does pass real estate; II. What is real estate when the will purports to pass it; III. The quantity or nature of the estate in lands which the devisee takes, as in fee simple or for life, &c., if the domicile is also the *locus rei sitæ*; IV. The *designatio personarum*; V. The import of ambiguous terms. Still it is a rule of construction, that, if the testator evidently refers to the law of the *situs rei*, that will be invoked for the interpretation of the will.

See, on these points, Savigny's System, l. viii. Redfield's edition of Story's Conflict of Laws, §§ 474-479].—D.

[¹ For 52 read 58.]—G.G.W.

[¹¹ For Huberus, ubi supra. read [Huberus, ubi supra.].]—G.G.W.

[¹¹¹ For 840-870 read 840-871.]—G.G.W.

[^{1v} For i read II.]—G.G.W.

which all the property of a deceased foreigner (movable and immovable) was confiscated to the use of the State, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the decedent.(a) In the progress of civilization, this barbarous and inhospitable usage has been, by degrees, almost entirely abolished. This improvement has been accomplished either by municipal regulations, or by international compacts founded upon the basis of reciprocity. Previous to the French Revolution of 1789, the *droit d'aubaine* had been either abolished or modified, by treaties between France and other States; and it was entirely abrogated by a decree of the Constituent Assembly, in 1791, with respect to all nations, without exception and without regard to reciprocity. This gratuitous concession was retracted, and the subject placed on its original footing of reciprocity by the Code Napoleon, in 1803; but this part of the Civil Code was again repealed, by the Ordinance of the 14th July, 1819, admitting foreigners to the right [139] of possessing both real and personal property in France, and of taking by succession *ab intestato*, or by will, in the same manner with native subjects.(b)

The analogous usage of the *droit de détraction*, or *droit de retraite*, (*jus detractûs*) by which a tax was levied upon the removal from one State to another of property acquired by succession or testamentary disposition, has also been reciprocally abolished in most civilized countries.

The stipulations contained in the treaties of 1778 and 1800, between the United States and France, for the mutual abolition of the *droit d'aubaine* and the *droit de détraction* between the two countries, have expired with those treaties;⁴⁷ and the provision in the treaty of

(a) Du Cange (Gloss. Med. Ævi, voce *Albinagium* et *Albani*) derives the term from *advenæ*. Other etymologists derive it from *alibi natus*. During the Middle Ages, the Scots were called *Albani* in France, in common with all other aliens; and as the Gothic term *Albanach* is even now applied by the Highlanders of Scotland to their race, it may have been transferred by the continental nations to all foreigners.

(b) Rotteck und Welcker, Staats-Lexicon, art. *Gastrecht*, Band 6, § 362. Vattel, liv. ii. ch. 8, §§ 112-114. Klüber, Droit des Gens, Part II. tit. 1, ch. 2, §§ 32, 33.⁽¹⁾ Von Mayer,⁽¹¹⁾ Corp. Jur. Confæd. Germanicæ, tom. ii. p. 17. Merlin, Répertoire, tit. *Aubaine*.

[⁴⁷ The treaty of the United States with France, of 23 February, 1853, is intended to authorize citizens of each country to hold real and personal estate in the other, in the same manner with its own citizens; but the treaty was made upon the theory that each State of the Union had exclusive control over that subject within its own limits. It accordingly takes the form of authorizing it as far as the laws of each State of the Union permit, with an engagement on the part of the President to recommend to the several States to pass laws to enable the treaty to operate, and with a right reserved to France to govern herself by rules of reciprocity. U. S. Laws, x. 992. The better opinion seems to be, that the treaty-making power of the general government is sufficient, under our Constitution, to reach the objects of this treaty, and to establish, by its own force, a law which shall be paramount in each State. Fairfax v. Hunter, Cranch, vii. 627. Ware v. Hylton, Dall. iii. 242. Opinions of Att'y-Gen. viii. 415. Halleck's Inter. Law, 157, where a great many cases are cited in support of this power in the

[¹ For §§ 32, 33 read §§ 82, 83.]—G.G.W.

[¹¹ For Mayer read Meyer.]—G.G.W.

1794, between the United States and Great Britain, by which the citizens and subjects of the two countries, who then held lands within their respective territories, were to continue to hold them according to the nature and tenure of their respective estates and titles therein, was limited to titles existing at the signature of the treaty, and is rapidly becoming obsolete by the lapse of time.(c) But by the stipulations contained in a great number of subsisting treaties, between the United States and various powers of Europe and America, it is provided, that 'where on the [140] death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of *détraction* on the part of the government of the respective States.(d)

§ 83. As to the personal property, the *lex domicilii* of its owner prevails over the law of the country where such property is situated, so far as respects the rule of inheritance:—*Mobilia ossibus inhaerent, personam sequuntur*. Thus the law of the place, where the owner of personal property was domiciled at the time of his decease, governs the succession *ab intestato* as to his personal effects wherever they may be situated.(a) Yet it had once been doubted, how far a British subject could, by changing his native domicile for a foreign domicile without the British empire, change the rule of succession to his personal property in Great Britain; though it was admitted that a change of domicile, within the empire, as from England to Scotland, would have that effect.(b) But these doubts have been overruled in a more recent decision, by the Court of Delegates in England establishing the law, that the actual foreign domicile of a British subject is exclusively to govern, in respect to his testamentary disposition of personal property, as it would in the case of a mere foreigner.(c)

So also the law of a place where any instrument, relating to per-

general government. Kent's Comm. iv. 420.⁽¹⁾ Jefferson's Works, iii. 365. Treaties on this subject, more or less for the same general purpose, exist with France, Russia, Austria, Naples, with most of the German States and of the States of South America, and with Mexico and the Hawaiian Islands. U. S. Laws, viii. ix. x. and xi., under the name of each nation.—D.

(c) Kent's Comm. ii. 67–69, 5th edit.

(d) Treaty of 1828, between the United States and Prussia, art. 14. Elliot's Am. Diplom. Code, i. 388.

(a) Huberus, Prælect. tom. ii. lib. i. tit. 3, de Conflict. Leg. §§ 14, 15. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 16. See also an opinion given by Grotius as counsel in 1613, Henry's Foreign Law, App., 196; Merlin, Répertoire, tit. Loi, § 6, No. 3; Fœlix, Droit International Privé, § 37.

(b) Per Sir J. Nicholl, in *Curling v. Thornton*, Addams' Eccles. Rep. ii. 17.

(c) *Stanley v. Bernes*, Haggard's Eccles. Rep. iii. 393–465. *Moore v. Davell*, iv. 346, 354.

[¹ For iv. 420 read I, 167.]—G.G.W.

sonal property, is executed by a party domiciled in that place, governs, as to the external form, the interpretation, and the effect of the instrument: *Locus regit actum*. Thus a testament of personal property, if executed according to the formalities required by the law of the place where it is made, and where the party making it was domiciled at the time of its execution, is valid in every other [141] country, and is to be interpreted and given effect to according to the *lex loci*.

This principle, laid down by all the text-writers, was recently recognized in England in a case where a native of Scotland, domiciled in India, but who possessed heritable bonds in Scotland, as well as personal property there, and also in India, having executed a will in India, ineffectual to convey Scottish heritage; and a question having arisen whether his heir at law (who claimed the heritable bonds as heir) was also entitled to a share of the movable property as legatee under the will: It was held by Lord Chancellor Brougham,^[1] in delivering the judgment of the House of Lords affirming that of the court below, that the construction of the will, and the legal consequences of that construction, must be determined by the law of the land where it was made, and where the testator had his domicile, that is to say, by the law of England prevailing in that country; and this, although the will was made the subject of judicial inquiry in the tribunals of Scotland; for these courts also are bound to decide according to the law of the place where the will was made.^(d)⁴⁸

Personal
status.

§ 84. The sovereign power of municipal legislation also extends to the regulation of the personal rights of the citizens of the State, and to every thing affecting their civil state and condition.

It extends (with certain exceptions) to the supreme police over all persons within the territory, whether citizens or not, and to all criminal offences committed by them within the same.^(a)

Some of these exceptions arise from the positive law of nations, others are the effect of special compact.

There are also certain cases where the municipal laws of the State, civil and criminal, operate beyond its territorial jurisdiction. These are,

Laws re-
lating to the

[142] I. Laws relating to the state and capacity of persons. In

(d) Trotter v. Trotter, Wilson and Shaw's Rep. iii. 407-414.

[⁴⁸ Story's Conflict of Laws, §§ 465-479. Burge's Col. and For. Laws, iv. 169, 217, 577-581, 588-590. Boullenois, ii. App. 38; i. 696-721. Foelix, Conflit des Lois, 204-216, 346-360 (Revue Etr. et Franc. 1840). P. Voet de Stat. 255 (A.D. 1715). Hertii Opera, de Coll. Leg. 112 (A.D. 1737). J. Voet, Ad Pand. I. lib. i. pp. 44, 45; lib. xxviii. tit. 1; II. lib. xxviii. lib. xxxviii. Rodenburg de Div. Stat. tit. 2, ch. 5. Huberus, lib. i. tit. 3. Henry on Foreign Law, 97.]—D.

(a) 'Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ, omnesque ei subjectos obligant, nec ultra. Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur.' Huberus, tom. ii. lib. i. tit. 3, de Conflict. Leg. § 2.

[¹ For Brougham read Lyndhurst.]—G.G.W.

general, the laws of the State, applicable to the civil condition and personal capacity of its citizens, operate upon them even when resident in a foreign country.

Such are those universal personal qualities which take effect either from birth, such as citizenship, legitimacy, and illegitimacy; at a fixed time after birth, as minority and majority; or at an indeterminate time after birth, as idiocy and lunacy, bankruptcy, marriage, and divorce, ascertained by the judgment of a competent tribunal. The laws of the State affecting all these personal qualities of its subjects travel with them wherever they go, and attach to them in whatever country they are resident.^(b)

state and capacity of persons may operate extra-territorially.

This general rule is, however, subject to the following exceptions:

§ 85. 1. To the right of every independent sovereign State to naturalize foreigners and to confer upon them the privileges of their acquired domicile.

Naturalization.

Even supposing a natural-born subject of one country cannot throw off his primitive allegiance, so as to cease to be responsible for criminal acts against his native country, it has been determined, both in Great Britain and the United States, that he may become by residence and naturalization in a foreign State entitled to all the commercial privileges of his acquired domicile and citizenship. Thus, by the treaty of 1794, between the United States and Great Britain, the trade to the countries beyond the Cape of Good Hope, within the limits of the East India Company's charter, was opened to American citizens, whilst it still continued prohibited to British subjects: it was held by the Court of King's Bench that a natural-born British subject might become a citizen of the United States, and be entitled to all the advantages of trade conceded between his country and that foreign country; and that the circumstance of his returning to his native country for a mere temporary cause would not deprive him of those advantages.⁴⁹

(b) Pardessus, *Droit Commercial*, Part VI. tit. 7, ch. 2, § 1. Fœlix, *Droit International Privé*, liv. i. tit. 1, § 31. 'Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personæ alibi gaudent vel subjecti sunt, fruantur et subjiciantur.' Huberus, tom. ii. lib. i. tit. 3, de *Conflict. Leg.* § 12.

[⁴⁹ *Naturalization*.—Naturalization, in most of its aspects, belongs to the department of municipal law, or private international law. Most questions involving the private rights of a naturalized citizen to property and to commercial privileges and exemptions, whether in war or peace, are tested by the fact of domicile rather than of political citizenship. Public international law can seldom be concerned in the question of political citizenship acquired by naturalization, unless the State of the naturalized citizen's birth makes some claim upon him which it could not make upon an alien under the same circumstances: for instance, if it claims military service, or compels him to remain in the country to perform civil duties, or should treat him as a traitor if taken in arms in the service of his adopted country against the country of his birth.

Every nation claims the right to give the complete character of a citizen to an alien,

Sovereign
right of
every inde-
pendent
State over
the property
within its
territorial
limits.

[143] § 86. 2. The sovereign right of every independent State to regulate the property within its territory constitutes another exception to the rule.

without consulting the wish of the State of his birth. Most nations admit, that if a native voluntarily emigrates and makes a permanent domicile in another country, and receives from that country the full rights of citizenship, the country of his birth cannot enforce claims upon him originating after his naturalization. It is the English doctrine, however, that the obligation of allegiance is for life. Yet Dr. Twiss says of the English doctrine, that it is the creature of municipal law, and 'finds no countenance in the law of nations, as it is in direct conflict with the incontestable rule of that law.' Law of Nations, i. 231. How far nations that do not hold this extreme doctrine may go, in enforcing obligations originating before naturalization, is by no means settled in the practice of nations.

In the United States, the inclination of the judiciary had been to follow the rule of the English common law, and to hold that neither a native nor a naturalized citizen can throw off his allegiance without consent of the State. Kent's Comm. ii. 49. Story on the Constitution, iii. 3, n. 1.^[1] Wharton's State Trials, 654. Opinions of Attorney-General, viii. 157. But the legislative and executive departments have acted upon the principle that actual expatriation and new naturalization, when the act and the intent combine, not only deprive the citizen of all claim upon the protection of his original country, but deprive that country of claims upon its former citizen against the will of the country of his adoption. But no man can renounce allegiance to a country in which he continues to reside, whatever forms he may go through. Daily on Naturalization, 26. And, if a naturalized citizen returns to the country of his birth, the United States has not interfered to protect him against the claims of that country for duties actually due from him as a subject before his naturalization. But it asserts a right to protect him against claims not ascertained and perfected before that time. For instance, if a foreign subject has been completely enlisted into the military service by conscription before expatriation, and voluntarily returns, the United States does not protect him against the obligation to perform the military duty; but if, at the time of expatriation, his obligation was that of a general liability of a class, which had not been ascertained and fixed upon him personally, the United States does interfere for his protection. Mr. Cass, in a letter to the United States Minister at Berlin, of July 8, 1859, says: 'The right of expatriation cannot at this day be doubted or denied in the United States. The idea has been repudiated, ever [144] since the origin of our government, that a man is bound to remain for ever in the country of his birth. . . . The doctrine of perpetual allegiance is a relic of barbarism, which has been disappearing from Christendom during the last century.' Mr. Attorney-General Black, in the case of Amthor, a Bavarian, naturalized in the United States, who returned to Bavaria, gave an opinion, in 1857, admitting the right to renounce the citizenship of naturalization and resume that of birth, by an actual and *bonâ-fide* return, with family and property, and a change of permanent domicile. Mr. Black said that no mode of renunciation was prescribed; but, as the right was admitted, if the fact and intent coincided and were sufficient to satisfy the government of the United States, and Bavaria treated Amthor as a citizen, he could not claim the rights of a citizen from the United States, or invoke its protection. In the war of 1812, Great Britain threatened to punish as traitors its native subjects naturalized in the United States and taken in arms. This was met by the arrest of British officers as hostages, with a threat of retaliation, which settled the question practically for the time, the British Government afterwards including those native Britons in the cartels of exchange. Annual Reg. 1813, p. 190; 1814, p. 182. Mr. Wheaton, while Minister at Berlin, declined to interfere to protect a Prussian subject, naturalized in the United States and returned to Prussia, from the military service. He said: 'Had you remained in the United States, or visited any foreign country except Prussia on your lawful business, you would have been protected by the American authorities, at home and abroad, in the enjoyment of your rights and privileges as a naturalized citizen of the United States. But, having returned to the country of your birth, your native domicile and national character revert, so long as you remain in the Prussian dominions; and you are bound in all respects to obey the laws exactly as if you had never emigrated.' Mr. Wheaton to Mr. Forsyth, July 29, 1840. Mr. Everett, Secretary of State, wrote to Mr. Barnard, Jan. 14, 1853: 'If a

[¹ Insert § 1099 after n. 1:—G.G.W.]

Thus the personal capacity to contract a marriage, as to age, consent of parents, &c., is regulated by the law of the State of which the

Prussian subject chooses^[1] to emigrate to a foreign country without obtaining the certificate which alone can discharge him from the obligations of military service, he takes that step at his own risk. He elects to go abroad under the burden of a duty he owes^[11] to his government. His departure is of the nature of an escape from her laws; and, if at any subsequent period, he is indiscreet enough to return to his native country, he cannot complain if those laws are executed to his disadvantage.' Mr. Webster, when Secretary of State, took the ground, that, if a country does not acknowledge the right of a native to renounce his allegiance, it may enforce its claims if he is found within its jurisdiction. Mr. Cass, Secretary of State, writes to our minister at Berlin, July 9,^[11] 1859: 'I confine the foreign jurisdiction in regard to our naturalized citizens to such of them as were in the army, or actually called into it, at the time they left Prussia; that is, to the case of actual desertion, or of^[1v] refusal to enter the army after having been regularly drafted and called into it by the government.' The Prussian Government refused to admit the distinction set up by the United States between inchoate and perfected obligations, where a permit of emigration was not obtained, and claimed unlimited authority over its returned subjects. Baron Manteuffel to Mr. Fay, Oct. 22, 1852. Still Prussia and the other German States have avoided collision with the United States by granting discharges on the application of the United States Minister. For the documents cited above, see Senate Ex. Doc. No. 37, 36th Cong. 1st Sess. pp. 7, 49, 54, 135, 167.

Another question has been mooted between the United States and Prussia, as to the right of naturalized Prussians, who left Prussia under a permit of emigration, [145] to return to Prussia and reside there as American citizens, within the terms of the treaty of 1828. In such case, the Prussian Government claims the right, as its discretion, to order the person out of the country, or to put restrictions upon his residence. Baron Manteuffel to Mr. Wright, Nov. 9, 1857.

A similar question arose between France and the United States in the case of Michel Zeiter in 1859-60. The French Government claimed military service from Zeiter, on the ground that he emigrated and naturalized himself before he had satisfied the obligation of military service that lay upon him by law. The United States Government contended that the rights of France did not extend to military duty, 'the performance of which has not been actually demanded of him before his emigration. A prospective liability to service in the army is not sufficient. The obligation of contingent duties, depending upon time, sortition, or events thereafter to occur, is not recognized.' Correspondence between Mr. Mason and Count Walewski, November, 1859; and Mr. Faulkner and M. Thouvenel, April, 1860. The case of Zeiter came before the French judicial tribunals, and was decided in his favor.

Spain contends for an unlimited right over the returned subject for subsequent as well as past obligations. The case of Gavino de Liaño, Senate Ex. Doc. No. 38, 36th Cong. p. 167.^[v]

During the civil war in the United States, the draft was confined to citizens, native or naturalized, and 'persons of foreign birth who shall have declared on oath their intention to become citizens' (United-States Laws, xii. 731); and all such persons were, for a time, prohibited from leaving the country.

On the subject of naturalization, see Fœlix, *Droit Intern. Privé*, i. 81-100. Kent's Comm. i. lect. 4.^[v1] Woolsey's *Introd.* § 66. Phillimore, *Intern. Law*, i. 350-354. Fœlix, *Revue Française et Etrangère*,^[v11] ii. 328. Martens' *Nouv. Recueil*, ii. De Beaudant, *de la Naturalisation*. Westlake, *Pr. Intern. Law*. Twiss, *Law of Nations*, i. ch. 9. *New American Cyclopædia*, xii. 'Naturalization.' Hefter, *Europ. Völkerr.* liv. i. ch. 1, § 4.

The Cases arising out of the Bombardment of Greytown.—In the cases arising out of the bombardment of Greytown by the United-States fleet in 1854, when a good deal of neutral as well as American property was destroyed, the rule was adopted by the United States, and acquiesced in by the British and French governments, that, if a person takes up a residence in a foreign place, and his property suffers there by reason of belligerent acts committed against

[¹ For If a Prussian subject chooses *read* If, then, a Prussian subject, born and living under this state of law, chooses.]—G.G.W.

[¹¹ For duty he owes *read* duty which he owes.]—G.G.W.

[¹¹¹ For 9 *read* 8.]—G.G.W.

[^{1v} For of *read* a.]—G.G.W.

[^v For Cong. p. 167 *read* Cong., 1st Sess., p. 224.]—G.G.W.

[^{v1} For i. lect. 4 *read* ii. lect. 24.]—G.G.W.

[^{v11} For *Revue Française et Etrangère read* *Revue Etrangère et Française*.]—G.G.W.

party is a subject; but the effects of a nuptial contract upon real property (*immobilia*) in another [144] State are determined by the *lex*

that place by another foreign nation, he cannot have remuneration from the latter nation by the intervention of his own sovereign. He must take the chances of the country in which he chooses to reside; and, if injury is done to his property by acts of war committed against that country, his only claim, if any, is a personal one against the government of the country of his residence, in which his own sovereign will not interest himself. The utmost that such a citizen, domiciled abroad, can require of his own government is to see that no discriminations are made against him in the belligerent acts of the nation attacking the place, or by the nation under whose protection he is residing. See Mr. Marcy, Secretary of State, to M. Sartiges, Feb. 26, 1857, Senate Ex. Doc. No. 9;^[1] and the speeches of Lord Palmerston and the Attorney-General in Parliament, in June and July, 1857. Hansard's Parl. Debates, cxlvi. 37-49, 1045.

The Cases arising out of the Bombardment of Antwerp.—Property of foreign citizens [146] deposited in the warehouses of the government of the Netherlands at Antwerp, before the revolution of 1830, was destroyed by the Dutch, in the bombardment of that place, in their attempt to defeat the revolution. The independence of Belgium was established by the intervention of the great powers. These powers concurred in holding that the foreign merchants could not ask their governments to make reclamations on the Dutch Government after the independence of Belgium was acknowledged. The powers, however, claimed compensation from the newly established State of Belgium, on the ground that property so situated must be protected by the government of the country in which it lay, which government was then the State of Belgium, recognized as independent afterwards.

The Case of Martin Koszta.—Martin Koszta, a Hungarian, had taken part with his country in the civil war and fled to Turkey, where he was arrested, but released upon a promise to leave Turkey. He came to the United States, and had acquired a residence there, and made the declaration preliminary to naturalization, but had not become a citizen. In this state of things, he went to Smyrna for temporary commercial purposes, and placed himself under the protection of the Consul of the United States at Smyrna and their Chargé d'Affaires at Constantinople, and was furnished with a *tezkerch* (a passport) by them. He was seized by Austrian officials, and placed in confinement on board an Austrian vessel of war in the harbor. The Turkish authorities disavowed and protested against this act, as a violation of Turkish sovereignty. The commander of a vessel of war of the United States demanded of the Austrian vessel the release of Koszta, and prepared to open fire upon her, when Koszta was, by agreement, placed under the protection and custody of the French Consul-General, to await the action of the powers concerned. In the subsequent correspondence upon this subject between the governments of the three countries involved, the United States claimed the right to relieve a domiciled subject of the United States, although not naturalized, from arrest of his person, made within the territories of a friendly State where he was temporarily sojourning for business purposes, by the agents of any other State, although that of his birth; and, if the arrest was in violation of the sovereignty of the State within which it was made, and that State could not or would not release the prisoner, the United States would do so by force, within that territory. And, at all events, the objection of violation of territorial sovereignty by a forcible release was not one which the arresting government could make against the United States. Mr. Marcy to M. Hülsemann, Sept. 26, 1853, Senate^[11] Ex. Doc. No. 1, 33d Congress.^[11]

The Case of Simon Tousig.—This differed materially from that of Koszta. Tousig, a subject of Austria, had acquired a domicile in the United States, but was not naturalized, and voluntarily returned to Austria with a passport from the American Department of State. He was arrested on charge of offences committed before leaving Austria. He appealed to the United States Minister for protection, who laid the case before the Department of State. Mr. Marcy replied, that the passport was improperly granted, being deliverable only to citizens; and that, although a domiciled resident of the United States, by voluntarily returning to Austria and placing himself under her jurisdiction, he lost the protection of the United States. Koszta, on the other hand, had not returned to Austria, but was arrested in Turkish territory, by Austrian agents, while under the protection of the passport usually granted by the consuls

[¹ Insert 35th Cong., 1st Sess. after No. 9.]—G.G.W.

[¹¹ For Senate read House.]—G.G.W.

[¹¹¹ Insert 1st Sess. after Congress.]—G.G.W.

loci rei sitæ. Huberus, indeed lays down the contrary doctrine, upon the ground that the foreign law, in this case, does not affect the territory immediately, but only in [145] an incidental manner, and that by the implied consent of the sovereign, for the benefit of his subjects, without prejudicing his or their rights. But the practice of nations is certainly different, [146] and therefore no such consent can be implied to waive the local law which has impressed certain indelible qualities upon immovable property within the territorial jurisdiction.

[147] § 87. As to personal property (*mobilia*) the *lex loci contractûs* or *lex domicilii* may, in certain cases, prevail over that of the place where the property is situated. Huberus holds that not only the marriage contract itself, duly celebrated in a given place, is valid in all other places, but that the rights and effects of the contract, as depending upon the *lex loci*, are to be equally in force everywhere. If this rule be confined to personal property, it may be considered as confirmed by the unanimous authority of the public jurists, who unite in maintaining the doctrine that the incidents and effects of the marriage upon the property of the parties, wherever situated, are to be governed by the law of the matrimonial domicil, in the absence of any other positive nuptial contract. But if there be an express ante-nuptial contract, the rights of the parties under it are to be governed by the *lex loci contractûs*.⁵⁰

§ 88. By the general international law of Europe and America, a certificate of discharge obtained by a bankrupt in the country of which he is a subject, and where the contract was made and the parties domiciled, is valid to discharge the debtor in every other country; but the opinions of jurists and the practice of nations have been much divided upon the question, how far the title of his assignees or syndics will control his personal property situated in a foreign country, and prevent its being attached and distributed under the local laws in a different course from that prescribed by the bankrupt code of his own

Effect of bankrupt discharge and title of assignees in another country.

of Christian nations in the Levant to residents of their respective countries, and respected by the Turkish powers. Cong. Doc. 33d Congress: Ex. Doc. No. 41.⁽¹⁾—D.

[⁵⁰ The questions arising out of marriages made in a foreign country, whose laws differ from those of the place of domicil of the parties, as to the capacity of the parties to make the contract, the solemnities and conditions required by positive law, and the effect of the marriage on the movable and immovable property of the parties, have been fully treated, with the light of the latest judicial decisions and text-writers, in Redfield's edition of Story's Conflict of Laws, chs. 5, 6.

See also Fergusson on Marriage and Divorce.⁽¹¹⁾ Burge on Col. and For. Law, i. Part I. Kent's Comm. ii. lect. 28. Huberus, lib. i. tit. 3, de Conflict. Leg. Hertii Opera, de Coll. Leg. Pothier, Traité du Mariage. Boullenois, I. Rodenburg de Div. Stat. Merlin, Répert. Autor. Marital. Henry on For. Laws. Le Brun, Traité de la Communautés. Fröland, Mémoire.⁽¹¹¹⁾—D.

[¹ For Cong. Doc. 33d Congress: Ex. Doc. No. 41 read House Ex. Doc. 33d Cong. 1st Sess. No. 41].—G.G.W.

[¹¹ Insert Consistorial Reports, after Divorce.].—G.G.W.

[¹¹¹ For Fröland, Mémoire read Fröland, Mémoires.].—G.G.W.

country. According to the law of most European countries, the proceeding which is commenced in the country of the bankrupt's domicil draws to itself the exclusive right to take and distribute the property. The rule thus established is rested upon the general principle that personal (or mova[148]ble) property is, by a legal fiction, considered as situated in the country where the bankrupt had his domicil. But the principles of jurisprudence, as adopted in the United States, consider the *lex loci rei sitæ* as prevailing over the *lex domicilii* in respect to creditors, and that the laws of other States cannot be permitted to have an extra-territorial operation to the prejudice of the authority, rights, and interests of the State where the property lies. The Supreme Court of the United States has, therefore, determined that both the government under its prerogative priority, and private creditors attaching under the local laws, are to be preferred to the claim of the assignees for the benefit of the general creditors under a foreign bankrupt-law, although the debtor was domiciled and the contract made in a foreign country.^(a)

The *lex loci contractus* often causes exceptions to this rule.

§ 89. 3. The general rule as to the application of personal statutes yields in some cases to the operation of the *lex loci contractus*.

Thus a bankrupt's certificate under the laws of his own country cannot operate in another State, to discharge him from his debts contracted with foreigners in a foreign country. And though the personal capacity to enter into the nuptial contract as to age, consent of parents, and prohibited degrees of affinity, &c., is generally to be governed by the law of the State of which the party is a subject, the marriage ceremony is always regulated by the law of the place where it is celebrated; and if valid there, it is considered as valid everywhere else, unless made in fraud of the laws of the country of which the parties are domiciled subjects.⁵¹

(a) Bell's Commentaries on the Law of Scotland, ii. 681-687.⁽¹⁾ Rose's Cases in Bankruptcy, i. 462. Kent's Commentaries on American Law, ii. 393, 404-408, 459, 5th edit. Cranch's Rep. v. 289, Harrison v. Sterry. Wheaton's Rep. xii. 153-163, Ogden v. Saunders.

[⁵¹ This subject presents itself in several aspects as regards—I. The operation of the discharge granted in the State of the bankrupt's domicil to bar proceedings against him or his property, by citizens of other countries in their own courts. II. The title of the assignee in bankruptcy to the property of the bankrupt in other countries. III. His right to it as against proceedings by a creditor in a foreign country, commenced before the appointment of the assignee. IV. The effect of a sequestration and transfer of property by force of mere statutory enactment in a foreign country, irrespective of possession, and its retro-active power to divest intervening titles and possession *bonâ fide*, and to invalidate prior judicial proceedings by a creditor. V. The effect of a priority secured to certain classes of creditors, as against a foreign creditor suing in a court of his own country, where property of the bankrupt is situated. VI. The validity and effect of a private transfer of property to trustees by an insolvent person, for the benefit of all creditors equally, or giving priority to certain creditors, when it operates against the foreign creditor.

As this subject, like those of transfers of movable and immovable property by deed or will, and of marital rights, belongs to private international law, it is enough to refer to Story

[¹ For 681-687 read 281-287.]—G.G.W.

[149] § 90. II. The municipal laws of the State may also operate beyond its territorial jurisdiction, where a contract made within the territory comes either directly or incidentally in question in the judicial tribunals of a foreign State. Lex loci contractus.

A contract, valid by the law of the place where it is made, is, generally speaking, valid everywhere else. The general comity and mutual convenience of nations have established the rule, that the law of that place governs in every thing respecting the form, interpretation, obligation, and effect of the contract, wherever the authority, rights, and interests of other States and their citizens are not thereby prejudiced.^(a)

§ 91. This qualification of the rule suggests the exceptions which arise to its application. And, Exceptions to its operation.

1. It cannot apply to cases properly governed by the *lex loci rei sitæ*, (as in the case, before put, of the effect of a nuptial contract upon real property in a foreign State,) or by the laws of another State relating to the personal state and capacity of its citizens.

2. It cannot apply where it would injuriously conflict with the laws of another State relating to its police, its public health, its commerce, its revenue, and generally its sovereign authority, and the rights and interests of its citizens.

Thus, if goods are sold in a place where they are not prohibited, to be delivered in a place where they are prohibited, although the trade is perfectly lawful by the *lex loci contractus*, the price cannot be recovered in the State where the goods are deliverable, because to enforce the contract there would be to sanction a breach of its own commercial laws. But the tribunals of one country do not take notice of, or enforce, either directly or incidentally, the laws of trade or revenue of another State, and therefore an insurance of [150] prohibited trade may be enforced in the tribunals of any other country than that where it is prohibited by the local laws.^(a)⁵²

on Conflict of Laws (Redfield's), §§ 338, 403-423, 341 a, 347 a, 325 a to s. Bell's Comm. ii. B. ⁽¹⁾ Merlin, Répertoire, Faillite et Banqueroute. Rodenburg de Div. Stat. tit. 2. Burge's Col. and For. Laws, Part II.]—D.

(a) 'Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicatur.' Huberus, tom. ii. lib. i. tit. 3, de Conflict. Leg. § 2. 'Effecta contractuum, certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creetur præjudicium, in jure sibi quæsito.' Ib. § 11.

(a) Pardessus, Droit Commercial, part. vi. tit. 7, ch. 2, § 3. Emérigon, Traité d'Assurance, tom. i. pp. 212-215. Park on Insurance, 341, 6th edit. The moral equity of this rule has been strongly questioned by Bynkershoek and Pothier.

^[52] Story, in his Conflict of Laws, regrets this state of the law, but admits it to be settled too firmly perhaps to be shaken, except by legislation. Conflict of Laws, § 257. Westlake, also (Pr. Intern. Law, § 199), condemns the principle, and gives his opinion that each nation should refuse to take cognizance of a contract which has for its object the violation of the revenue

[¹ For B read 3.]—G.G.W.

Foreign marriages.

§ 92. Huberus holds that the contract of marriage is to be governed by the law of the place where it is celebrated, excepting fraudulent evasions of the law of the State to which the party is subject.^(a) Such are marriages contracted in a foreign [151] State, and according to its laws, by persons who are minors, or otherwise incapable of contracting, by the law of their own country. But according to the international marriage law of the British Empire, a clandestine marriage in Scotland, of parties originally domiciled in England, who resort to Scotland, for the sole purpose of evading the English marriage act, requiring the consent of parents or guardians, is considered valid in the English Ecclesiastical courts.⁵³ This jurisprudence is said to have been adopted upon the ground of its being a part of the general law and practice of Christendom, and that infinite confusion and mischief would ensue,

English law.

or navigation laws of another, or indemnity for losses incurred by such violation. Heffter (*Europ. Völker*. §§ 36–39) takes the same view of what the law should be, and cites a case decided by the Court of Appeals for the Rhenish provinces, to the effect that a contract to smuggle goods into another country was void as against good morals and the public interests. Of the same opinion are Pothier (*Assurance*, n. 58), Kent (*Comm.* iii. 266–8), Marshall (*Insurance*, 59–61), and Chitty (*Commerce*, 83).

This rule probably had its origin in the rival, retaliatory, and often permanently hostile navigation and revenue systems of the great commercial nations. The unwillingness of the courts of the United States to give effect to foreign bankrupt-laws, against the interests of their own citizens, arose from a like jealousy of systems which foreign countries adopt and alter at their pleasure; for the courts of the United States give effect to voluntary conveyances of property by parties themselves. The same jealousy prevents courts enforcing the purely political laws of other nations, and has always excluded from treaties for extradition, with the utmost care, the cases of persons charged with any other than offences against the general morality of nations. But courts in the United States have held that contracts are void, if made in the United States with a view to excite war or insurrection in a friendly State, or to furnish military supplies to citizens of a State at war with a State friendly to the United States. *Kennett v. Chambers*, Howard's Rep. xiv. 38. So of a contract made in one State which contemplates a violation of the police-laws for the preservation of health or morals of another State. *Terrett v. Bartlett*, Vermont Rep. xxi. 184. *Spalding v. Preston*, Ib. 9. See also *Grell v. Levy*, Jurist x. N.S. 210.—D.

(a) 'Si licitum est, eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eadem exceptione, prejudicii aliis non creandi.' Huberus, de Conflict. Leg. l. i. tit. 3, § 8. He puts, as an example of this exception, the case of parties going into another country, merely to evade the law of their own as to majority and guardianship. 'Sæpe fit, adolescentes⁽¹⁾ sub curatoribus agentes, furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam Orientalem, aliave loca, in quibus curatorum consensus ad matrimonium non requiritur, juxta leges Romanas, quæ apud nos hac parte cessant. Celebrant ibi matrimonium, et mox redeunt in patriam. Ego ita existimo, hanc rem manifeste pertinere ad eversionem juris nostri; et ideo non esse magistratus, huic obligatos, è jure gentium, ejusmodi nuptias agnoscere et ratas habere. Multoque magis statuendum est, eos contra jus gentium facere videri, qui civibus alieni imperii sua facilitate, jus patriis legibus contrarium, scientes, volentes, impertiuntur.' De Conflict. Leg., Id. § 123.⁽¹¹⁾

[⁵³ By the act of 19 & 20 Vict. ch. 96, 'no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland twenty-one⁽¹¹¹⁾ days next preceding such marriage.' Stephens's (Blackstone's) Commentaries, ii. 269.^(1v)—D.]

[¹ For fit, adolescentes read fit, ut adolescentes.]—G.G.W.

[¹¹ For § 123 read § 8.]—G.G.W.

[¹¹¹ For Scotland twenty-one read Scotland for twenty-one.]—G.G.W.

[^{1v} For 269 read 296.]—G.G.W.

with respect to legitimacy, succession, and other personal and proprietary rights, if the validity of the marriage contract was not determined by the law of the place where it was made. The same principle has been recognized between the different States of the American Union, upon similar grounds of public policy.^(b)⁵⁴

§ 93. On the other hand, the age of consent required by the French Civil Code is considered, by the law of France, as a personal quality of French subjects, following them wherever they remove; and, consequently, a marriage by a Frenchman, within the required age, will not be regarded as valid by the French tribunals, though the parties may have been above the age required by the law of the place where it was contracted.^(a)⁵⁵ French law.

[152] 3. Wherever, from the nature of the contract itself, or the law of the place where it is made, or the expressed intention of the parties, the contract is to be executed in another country, every thing which concerns its execution is to be determined by the law of that country. Those writers who affirm that this exception extends to every thing respecting the nature, the validity, and the interpretation of the contract, appear to have erred, in supposing that the authorities are at variance on this question. They will be found, on a critical

(b) Haggard's Cons. Rep. ii. 428-433. Kent's Commentaries, ii. 93.

[⁵⁴ Story's Conflict of Laws, § 124, Redfield's note 5. Burge's Col. and For. Laws, i. 192. Woolsey's Introd. § 74. Halleck's Intern. Law, 157. Steele v. Braddell, Milw. Cons. Rep. i. 1. Warrenden v. Warrenden, Blight's Rep.⁽¹⁾ ix. 129. Brook v. Brook, House of Lords Cases, ix. Fergusson on Marr. and Div.⁽¹¹⁾ 63. Medway v. Needham, Massachusetts Rep. xvi. 157. Putnam v. Putnam, Pick. Rep. viii. 433. W. Cambridge v. Lexington, Pick. Rep. i. 506.]—D.

(a) Merlin, Répertoire, tit. Loi, § 6. Toullier, Droit Français, tom. i. Nos. 118, 576.

[⁵⁵ The Cour Impériale, in 1861, enforced this rule in the case of the marriage of Jerome Bonaparte to Miss Patterson, contracted in the United States in 1803, valid by the law of the place of celebration. Jerome Bonaparte had not attained the required age; and official notice of the disability under the French law had been given to the parents of the bride before the marriage. The Pope refused to annul this marriage, on the application of Napoleon I. Jerome, notwithstanding, married a princess of Würtemberg, his American wife being alive. The case arose on a claim of the son by the American marriage, Jerome Napoleon Bonaparte, to a share in the division of his father's estate. The French rule would have no effect out of France. Story's Conflict of Laws, § 90. The British Royal-Marriage Act prohibits marriage by certain members of the royal family without the consent of the sovereign. Under this, it was held that the marriage of His Royal Highness the Duke of Sussex, celebrated at Rome, and admitted to be valid there, was void in England, the consent of the sovereign having been withheld. See Westlake, Pr. Intern. Law, § 348.

British statutes give the same validity as if celebrated in England to marriages solemnized abroad, in the chapels or houses of ambassadors, or before resident consuls, or chaplains in the army within their lines. 4 Geo. IV.,⁽¹¹⁾ and 12 & 13 Vict.^(1v)

A statute of the United States of 1860 gives efficacy to marriages before American consuls, as if celebrated at home.

For the details of the decisions of the conflicts of laws respecting marriage, see Bishop on Marr. and Div. § 125. Story's Conflict of Laws, § 113. Opinions of Attorneys-General (U. States), vii. 22.]—D.

[¹ For Warrenden v. Warrenden, Blight's Rep. read Warrender v. Warrender, Blight's Rep.]—G.G.W.

[¹¹ Insert Consistorial Reports, after Div.]—G.G.W.

[¹¹¹ Insert Ch. 91 after Geo. IV.]—G.G.W.

[^{1v} Insert Ch. 68 after 13 Vict.]—G.G.W.

examination, to establish the distinction between what relates to the validity and interpretation, and what relates to the execution, of the contract. By the usage of nations, the former is to be determined by the *lex loci contractûs*, the latter by the law of the place where it is to be carried into execution.^(b)⁵⁶

Lex fori. § 94. 4. As every sovereign State has the exclusive right of regulating the proceedings, in its own courts of justice, the *lex loci contractûs* of another country cannot apply to such cases as are properly to be determined by the *lex fori* of that State where the contract is brought in question.

Thus, if a contract made in one country is attempted to be enforced, or comes incidentally in question, in the judicial tribunals of another, every thing relating to the forms of proceeding, the rules of evidence, and of limitation, (or prescription,) is to be determined by the law of the State where the suit is pending, not of that where the contract is made.^(a)⁵⁷

Foreign sovereign, his ambassador, army, or fleet, within the territory of another State. [153] § 95. III. The municipal institutions of a State may also operate beyond the limits of its territorial jurisdiction, in the following cases:—

1. The person of a foreign sovereign, going into the territory of another State, is, by the general usage and comity of nations, exempt from the ordinary local jurisdiction. Representing the power, dignity, and all the sovereign attributes of his own nation, and going into the territory of another State, under the permission which (in time of peace) is implied from the absence of any prohibition, he is not amenable to the civil or criminal jurisdiction of the country where he temporarily resides.^(a)

2. The person of an ambassador, or other public minister, whilst within the territory of the State to which he is delegated, is also exempt from the local jurisdiction. His residence is considered as a continued residence in his own country, and he retains his national character, unmixed with that of the country where he locally resides.^(b)

3. A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign sovereign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place.^(c)

(b) Fœlix, Droit International Privé, § 74.

⁵⁶ Story's Conflict of Laws, §§ 242, 260, 263-266, 279 a, 280-283, 309, 314.]—D.

(a) Kent's Commentaries, ii. 459, 5th edit. Fœlix, Droit International Privé, § 76.

⁵⁷ Story's Conflict of Laws, §§ 557-576. Savigny, § 374, p. 277. Don v. Lippman, C. C. & Fin. v. 1. Boullenois, Ob. 33, 46. Rodenburg, de Div. Stat. tit. 2. Woolsey's Introd. § 73.]—D.

(a) Bynkershoek, de Foro Legat. cap. iii. § 13, and cap. ix. § 10.

(b) Vide *infra*, Part III. ch. 1.

(c) 'Exceptis tamen ducibus et generalibus, alicujus⁽¹⁾ exercitûs, vel classis maritimæ, vel

[¹ For generalibus, alicujus read generalibus vel generalissimis alicujus.]—G.G.W.

If there be no express prohibition, the ports of a friendly State are considered as open to the public armed and commissioned ships belonging to another nation, with whom that State is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under the license implied from the absence of any prohibition, or under an express permission stipulated by treaty. But the private vessels of one State, entering the ports of another, are not exempt from the local jurisdiction, unless by express compact, and to the extent provided by such compact.⁵⁸

[154] § 96. The above principles, respecting the exemption of vessels belonging to a foreign nation from the local jurisdiction, were asserted by the Supreme Court of the United States, in the celebrated case of *The Exchange*, a vessel which had originally belonged to an American citizen, but had been seized and confiscated at St. Sébastien, in Spain, and converted into a public armed vessel by the Emperor Napoleon, in 1810, and was reclaimed by the original owner, on her arrival in the port of Philadelphia.⁵⁹

The ship
Exchange.

In delivering the judgment of the Court in this case, Mr. Chief Justice Marshall stated that the jurisdiction of courts of justice was a branch of that possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not

ductoribus etiam alicujus navis militaris, nam isti in suos milites, gentem, et naves, libere jurisdictionem sive voluntariam sive contentiosam, sive civilem, sive criminalem, quod⁽¹⁾ occupant tanquam in suo proprio, exercere possunt,' etc. Casaregis, Disc. 136, 174.

[⁵⁸ The author is understood to have qualified this general statement respecting private vessels, in his review of Ortolan's *Diplomatie de la Mer*, in vol. ii. of the *Revue Etr. et Franc.* The treaty of 1853 between France and the United States adopts, as to private vessels, substantially the distinction made in the French law, as laid down and explained in § 102. The state of international law on the subject of private vessels in foreign ports is judiciously explained by Mr. Halleck in his treatise, pp. 171-2. It may be said to be this: So far as regards acts done at sea before her arrival in port, and acts done on board in port, by members of the crew to one another, and so far as regards the general regulation of the rights and duties of those belonging on board, the vessel is exempt from local jurisdiction; but, if the acts done on board affect the peace of the country in whose port she lies, or the persons or property of its subjects, to that extent that State has jurisdiction. The local authorities have a right to visit all such vessels, to ascertain the nature of any alleged occurrence on board. Of course, no exemption is ever claimed for injuries done by the vessel to property or persons in port, or for acts of her company not done on board the vessel, or for their personal contracts or civil obligations or duties relating to persons not of the ship's company.]—D.

[⁵⁹ In the case of the *Charles et George* (Martens' *Causas Célèbres*, v. 605), the French Government claimed the exemption of a public ship for a private vessel engaged on a private commercial enterprise, on the ground that she had on board an agent of the French Government to see that she did not violate the law of France forbidding the slave trade. The Portuguese Government had arrested the vessel for being engaged in that trade in Portuguese waters. The exemption was denied by Portugal, who yielded to the demand for restoration only on the ground of inability to resist the superior power of France. France refused to submit the case to arbitration. No European power offered aid to Portugal. The case has painfully the look of mere *vis major*.]—D.

[¹ *For criminalem, quod read criminalem in alieno territorio quod.*]—G.G.W.

imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent [155] of the nation itself. They could flow from no other legitimate source.

This consent might be either expressed or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction, within their respective territories, which sovereignty confers.

This consent might, in some instances, be tested by common usage, and by common opinion growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly, and without previous notice, exercise its territorial jurisdiction in a manner not consonant to the usages and received obligations of the civilized world.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, has given rise to a class of cases, in which every sovereign is understood to waive the exercise of a part of that complete, exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Exemption of the person of the foreign sovereign from the local jurisdiction. § 97. 1. One of these was the exemption of the person of the sovereign from arrest or detention within a foreign territory. If he enters that territory with the knowledge and license of its sovereign, that license, although containing no express stipulation exempting his person from arrest, was universally understood to imply such stipulation.

Why had the whole civilized world concurred in this construction? The answer could not be mistaken. A foreign sovereign was not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation, and it was to avoid this subjection that the license had been obtained. The character of the person to whom it was given, and the object for which it was granted, equally required that it should [156] be construed to impart full security to the person who had obtained it. This security, how-

ever, need not be expressed; it was implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which did not appear to be perfectly settled, a decision of which was not necessary to any conclusion to which the court might come in the case under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity had placed in their hands.⁶⁰

§ 98. 2. A second case, standing on the same principles with the first, was the immunity which all civilized nations allow to foreign ministers. Exemption of foreign ministers from the local jurisdiction.

Whatever might be the principle on which this immunity might be established, whether we consider the minister as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It was true that in some countries, and in the United States among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess. The assent of the local sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the consideration, that, without such exemptions, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance [157] to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain, privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

[⁶⁰ For a case of a foreign sovereign also a subject in the country of the *forum*, see *Duke of Brunswick v. the King of Hanover*, House of Lords Cases, ii. 1. Westlake's *Pr. Intern. Law*, § 137.]—D.

In what case a public minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, was an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original consent, has ceased to be entitled to them.

Exemption
from the
local juris-
diction of
foreign
troops pass-
ing through
the terri-
tory.

§ 99. A third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, was where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign, independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require.

[158] But if, without such express permission, an army should be led through the territories of a foreign prince, might the territorial jurisdiction be rightfully exercised over the individuals composing that army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permission and a particular license is not perceived. It would seem reasonable, that every immunity which would be conferred by a special license, would be, in like manner, conferred by such general permission.

It was obvious that the passage of an army through a foreign territory would probably be, at all times, inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominions it passed. Such a passage would break down some of the most decisive distinctions between peace and war, and would reduce a

nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like those that the general license to foreigners, to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign without his special permission, may justly be considered as committing an act of hostility; and, even if not opposed by force, acquires no privilege by its irregular and improper conduct. It might, however, well be questioned whether any other than the sovereign of the State is capable of deciding that such military commander is acting without a license.

§ 100. But the rule which is applicable to armies did not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war without [159] special license into a friendly port. A different rule, therefore, with respect to this species of military force, had been generally adopted. If, for reasons of State, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or against the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place.

Exemption of foreign ships of war entering the ports of any nation, under an express or implied permission.

The treaties between civilized nations, in almost every instance, contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports, and this is a license which he is not at liberty to retract.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived for distinguishing their case from that of vessels which enter by express assent.

The whole reasoning, upon which such exemption had been implied in the case of a sovereign or his minister, applies with full force to the exemption of ships of war in the case in question.

‘It is impossible to conceive,’ said Vattel, ‘that a prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign power; and this consideration

furnishes an additional argument, which completely establishes the independence of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independence; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation.'^(a)

Equally impossible was it to conceive, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this could not be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

Distinction
between
public and
private ves-
sels.

§ 101. According to the judgment of the Supreme Court of the United States, where, without treaty, the ports of a nation are open to the public and private ships of a friendly power, whose subjects have also liberty, without special license, to enter the country for business or amusement, a clear distinction was to be drawn between the rights accorded to private individuals, or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects, then, passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

But the situation of a public armed ship was, in all respects, different. She constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without seriously affecting his power and his dignity. The implied license,

(a) Vattel, *Droit des Gens*, liv. iv. ch. 7, § 92.

therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seemed to the court ought to be construed, as containing an exemption from the jurisdiction [161] of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly, in practice, nations had not yet asserted their jurisdiction over the public armed ships of a foreign sovereign, entering a port open for their reception.

Bynkershoek, a public jurist of great reputation, had indeed maintained that the property of a foreign sovereign was not distinguishable, by any legal exemption, from the property of an ordinary individual; and had quoted several cases in which courts of justice had exercised jurisdiction over cases in which a foreign sovereign was made a party defendant.^(a)

Without indicating any opinion on this question, it might safely be affirmed, that there is a manifest distinction between the private property of a person who happens to be a prince and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as, so far, laying down the prince and assuming the character of a private individual; but he cannot be presumed to do this with respect to any portion of that armed force which upholds his crown and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek was that of the Spanish ships of war, seized in 1668, in Flushing, for a debt due from the King of Spain. In that case the States-General interposed; and there is reason to believe, from the manner in which the transaction is stated, that either by the interference of government, or by the decision of the tribunal, the vessels were released.^(b)

This case of the Spanish vessels was believed to be the only case [162] furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the

(a) Bynkershoek, de Foro Legat, cap. iv.

(b) 'Anno 1668, privati quidam Regis Hispanici creditores, tres ejus regni naves bellicas, quæ portum Flissingensem subiverant, arresto detinuerunt, ut inde ipsis satisfaceret, Rege Hispanico ad certum diem per epistolam in jus vocato ad judices Flissingenses; sed ad legati Hispanici expostulationes Ordines Generales, 12 Dec. 1668, decreverunt, Zelandiæ Ordines curare vellent, naves illæ continuò demitterentur liberæ, admoneretur tamen per literas Hispaniæ Regina, ipsa curare vellet, ut illis creditoribus, in causâ justissimâ, satisfaceret, ne repressalias, quas imploraverunt, largiri, tenerentur.' Bynkershoek, cap. iv.

power of proceeding against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in the laws of the United States between public and private ships, would appear to proceed from the same opinion.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of the Supreme Court, to be so construed as to give them jurisdiction in a case in which the sovereign power had implicitly consented to waive its jurisdiction.

The court came to the conclusion, that the vessel in question being a public armed ship, in the service of a foreign sovereign, with whom the United States were at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise that, while necessarily within it and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.^(c)⁶¹

Law of
France, as
to the ex-
emption of
private ves-
sels from the
local juris-
diction.

[163] § 102. The maritime jurisprudence of France, in respect to foreign private vessels entering the French ports for the purposes of trade, appears to be inconsistent with the principles established in the above judgment of the Supreme Court of the United States; or, to speak more correctly, the legislation of France waives, in favor of such vessels, the exercise of the local jurisdiction to a greater extent than appears to be imperatively required by the general principles of international law. As it depends on the option of a nation to annex any conditions it thinks fit to the admission of foreign vessels, public or private, into its ports, so it may extend, to any degree it may think fit,

(c) Cranch's Rep. vii. 135-147, *The Schooner Exchange*.

⁶¹ It has recently been decided by the Supreme Court of Massachusetts, that a vessel owned and employed by the government of the United States, as an instrumentality for the performance of its public duties, cannot be proceeded against by a citizen, even to enforce a lien which attached before she became a public vessel. *Briggs v. The Light-ships*, ^(d) Allen's Rep., xi. It may be presumed that the comity of nations will extend to public property of friendly States the exemption which public policy requires a State to maintain for its own.]-D.

[¹ For *Briggs v. The Light-ships* read *Briggs* and another *v. Light-Boats*.]-G.G.W.

the immunities to which such vessels, entering under an implied license, are entitled by the general law and usage of nations.

The law of France, in respect to offences and torts committed on board foreign merchant vessels in French ports, establishes a twofold distinction between:

1. Acts of mere interior discipline of the vessel, or even crimes and offences committed by a person forming part of its officers and crew, against another person belonging to the same, where the peace of the port is not thereby disturbed.

2. Crimes and offences committed on board the vessel against persons not forming part of its officers and crew, or by any other than a person belonging to the same, or those committed by the officers and crew upon each other if the peace of the port is thereby disturbed.

In respect to acts of the first class, the French tribunals decline taking jurisdiction. The French law declares that the rights of the power to which the vessel belongs, should be respected, and that the local authority should not interfere, unless its aid is demanded. These acts, therefore, remain under the police and jurisdiction of the State to which the vessel belongs. In respect to those of the second class, the local jurisdiction is asserted by those tribunals. It is based on the principle, that the protection accorded to foreign merchantmen in the French ports cannot divest the territorial jurisdiction, so far as the interests of the State are affected; that a vessel admitted into a port of the State is of right subjected to the police regulations of the place; and that its crew are amenable to the tribunals of the country for offences committed on board of it against persons not belonging to the ship, as well as in actions [164] for civil contracts entered into with them; that the territorial jurisdiction for this class of cases is undeniable.

It is on these principles that the French authorities and tribunals act, with regard to merchant ships lying within their waters. The grounds upon which the jurisdiction is declined in one class of cases, and asserted in the other, are stated in a decision of the Council of State, pronounced in 1806. This decision arose from a conflict of jurisdiction between the local authorities of France and the American consuls in the French ports, in the two following cases:

§ 103. The first case was that of the American merchant vessel, *The Newton*, in the port of Antwerp; where the American consul and the local authorities both claimed exclusive jurisdiction over an assault committed by one of the seamen belonging to the crew against another, in the vessel's boat. The second was that of another American vessel, *The Sally*, in the port of Marseilles, where exclusive jurisdiction was claimed both by the local tribunals and by the American consul, as to a severe wound inflicted by the mate on one of the seamen, in the alleged exercise of discipline over the crew. The Council of State

The case
of *The
Newton*.

pronounced against the jurisdiction of the local tribunals and authorities in both cases, and assigned the following reasons for its decision :

‘Considering that a neutral vessel cannot be indefinitely regarded as a neutral place, and that the protection granted to such vessels in the French ports cannot oust the territorial jurisdiction, so far as respects the public interests of the State; that, consequently, a neutral vessel admitted into the ports of the State is rightfully subject to the laws of the police of that place where she is received; that her officers and crew are also amenable to the tribunals of the country for offences and torts (a) committed by them, even on board the vessel, against other persons than those belonging to the same, as well as for civil contracts made with them; but that, in respect to offences and torts committed on board the vessel, by one of the officers and crew against another, the rights of the neutral power ought to be respected, as exclusively concerning the internal discipline of the vessel, in which the local authorities ought not to interfere, unless their protection is demanded, or the peace and tranquillity of the port is disturbed,—the Council of State is of opinion that this distinction, indicated in the report of the Grand Judge, Minister of Justice, and conformable to usage, is the only rule proper to be adopted, in respect to this matter; and applying this doctrine to the two specific cases in which the consuls of the United States have claimed jurisdiction; considering that one of these cases was that of an assault committed in the boat of the American ship *Newton*, by one of the crew upon another, and the other case was that of a severe wound inflicted by the mate of the American ship *Sally* upon one of the seamen, for having made use of the boat without leave; is of opinion that the jurisdiction claimed by the American consuls ought to be allowed, and the French tribunals prohibited from taking cognizance of these cases.’(b)⁶²

(a) The term used in the original is *délits*, which includes every wrong done to the prejudice of individuals, whether they be *délits publics* or *délits privés*.

(b) Ortolan, *Règles Internationales de la Mer*, tom. i. pp. 293–298. Appendice, Annexe H. p. 441.

⁶² *Case of the Creole*.—The brig *Creole*, an American merchant-vessel, sailed from a port in Virginia in 1841, bound to New Orleans, having on board one hundred and thirty-five slaves. A portion of the slaves rose against the officers and got complete possession of the vessel, killing one passenger and severely wounding the captain and others of the crew, in the struggle. They compelled the mate, under threat of death, to navigate the vessel to Nassau, where she arrived and came to anchor. At the request of the United States Consul at Nassau, nineteen of the slaves, who were identified as having taken part in the acts of violence, were arrested by the local authorities, and held to await the decision of the British Government. As to the rest of the slaves, there was a question whether they got on shore and gained their liberty by their own act, or through the positive and officious interference of the colonial authorities, while the vessel was under control of the Consul and master. Mr. Webster addressed a letter to Lord Ashburton on this subject. His position is, that ‘if vessels⁽¹⁾ of the United States, pursuing lawful voyages from port to port along their own shore, are driven by stress of

[¹ For if vessels *read* If, therefore, vessels.]—G.G.W.

[166] § 104. Whatever may be the nature and extent of the exemption of the public or private vessels of one State from the local

weather, or carried by unlawful force, into British⁽¹⁾ ports, the government of the United States cannot consent that the local authorities in those ports shall take advantage of such misfortunes, and enter them, for the purpose of interfering with the condition of persons or things on board, as established by their own laws. If slaves, the property of citizens of the United States, escape into British⁽¹¹⁾ territories, it is not expected that they will be restored. In that case, the territorial jurisdiction of England will have become exclusive over them, and must decide their condition. But slaves on board of American vessels lying in British waters are not within the exclusive jurisdiction of England, or under the exclusive operation of English law; and this founds the broad distinction between the cases. If persons guilty of crimes in the United States seek an asylum in the British dominions, they will not be demanded until provision for such cases be made by treaty; because the giving up of criminals, fugitives from justice, is agreed and understood to be a matter in which every nation regulates its conduct according to its own discretion. It is no breach of comity to refuse such surrender. On the other hand, vessels of the United States, driven by necessity into British ports, and staying there no longer than the⁽¹¹¹⁾ necessity exists, violating no law, and having no intent to violate any law, will claim, and there will be claimed for them, protection and security, freedom from molestation and from all interference with the character or condition of persons or things on board. In the opinion of the government of the United States, such vessels, so driven and so detained by necessity in a friendly port, ought to be regarded as still pursuing their original voyage, and turned out of their direct course by^(1v) disaster or by wrongful violence; that they ought to receive all assistance necessary to enable them to resume that direct course; and that interference and molestation by the local authorities, where the whole voyage is lawful both in act and intent, is ground for just and grave complaint.' Webster's Works, vi. 303-318.^(v)

Mr. Wheaton wrote an article upon this subject in the *Revue Française et Étrangère*, ^(vi)ix. 345, in which he took the ground, that the Creole never passed under British jurisdiction so as to affect the legal relations of persons and things on board, or to give the British Government such jurisdiction over the persons on board as to make the case one of extradition; and that the master, with such aid as he could obtain from the Consul or otherwise, was entitled not only to carry to the United States all the persons on board, whether held as slaves or criminals, without molestation from the authorities, but to receive the assistance of those authorities to regain and hold possession of his vessel.

The United States Government demanded the restoration of the slaves, which was refused by the British Government, on the ground, that, being in fact at liberty within the British dominions, they could not be seized there when charged with no crime against British law, and while there was no treaty of extradition. This case was then submitted, as a private claim for pecuniary indemnity, to the Commission under the convention of Feb. 8, 1853. The commissioners being unable to agree, it was, by the terms of the convention, referred to an umpire, Mr. Joshua Bates, of London.

In deciding the case, Mr. Bates stated two propositions of law,—

First, That, as the slaves were perfectly quiet, and on board an American ship under the command of the captain, the authorities should have seen that the captain was protected in his rights over them.

Second, That 'the municipal law of England cannot authorize a magistrate to violate the law of nations, by invading with an armed force the vessel of a friendly nation that has committed no offence, and forcibly dissolving the relations which, by the laws of his country, the master^(v11) is bound to preserve and enforce on board.'

There would seem to be no doubt of the latter proposition; but the facts which Mr. Bates considered to be proved were hardly sufficient for its application. At the same time, they made a stronger case than was necessary for the first proposition. Although there was no 'invading with an armed force, and forcibly dissolving the relations,' the authorities still not only gave

[¹ For British read English.]—G.G.W.

[¹¹¹ For the read such.]—G.G.W.

[^v For 303-318 read 303-313.]—G.G.W.

[^{v1} For Française et Étrangère read Étrangère et Française.]—G.G.W.

[^{v11} For master read captain.]—G.G.W.

[¹¹ For into British read into the British.]—G.G.W.

[^{1v} For course by read course only by.]—G.G.W.

Exemption of public or private vessels from the local jurisdiction does not extend to justify acts of aggression against the security of the State.

jurisdiction in the ports of another, it is evident that this exemption, whether express or implied, can never be construed to justify acts of hostility committed by such vessel, her officers, and crew, in violation of the law of nations, against the security of the State in whose ports she is received, or to exclude the local tribunals and authorities from resorting to such measures of self-defence as the security of the State may require.

This just and salutary principle was asserted by the French Court of Cassation, in 1832, in the case of the private Sardinian [167] steam-vessel, *The Carlo Alberto*, which, after having landed on the southern coast of France the Duchess of Berry and several of her adherents with the view of exciting civil war in that country, put into a French port in distress. The judgment of the Court, pronounced upon the *conclusions* of M. Dupin, aîné, Procureur-Général, reversed the decision of the inferior tribunal releasing the prisoners taken on board the vessel, upon the following grounds:

1. That the principle of the law of nations according to which a foreign vessel, allied or neutral, is considered as forming part of the territory of the nation to which it belongs, and consequently is entitled to the privilege of the same inviolability with the territory itself, ceases to protect a vessel which commits acts of hostility in the French territory, inconsistent with its character of ally, or neutral; as if, for example, such vessel be chartered to serve as an instrument of conspiracy against the safety of the State, and after having landed some of the persons concerned in these acts, still continues to hover near the coast, with the rest of the conspirators on board, and at last puts into port under pretext of distress.

2. That supposing such allegation of distress be founded in fact, it could not serve as a plea to exclude the jurisdiction of the [168] local

no aid to the master, but officially announced to the negroes that they were free to go or stay on board, and this while there were private boats alongside ready to take them off, in which were men apparently ready to resist the use of force by the master to retake them. As to the former proposition of Mr. Bates, I do not find a course of precedents acted upon or acquiesced in by nations; and it seems open to speculation. It may be conceded, as a general statement, that local authorities ought to give active aid to a master in defending and enforcing, against the inmates of his vessel, the rights with which his own nation has intrusted him, if these rights are of a character generally recognized among all nations, and not prohibited by the law of the place. But it may well admit of doubt, whether the local authorities must give active aid to the master against persons on board his vessel who are doing no more than peacefully and quietly dissolving, or refusing to recognize, a relation which exists only by force of the law of the nation to which the vessel belongs, if the law is peculiar to that nation, and one which the law of the other country regards as against common right and public morals. The local authorities might not interfere to dissolve such relations, where the peace of the port or the public morals are not put in peril; but they might, it would seem, decline to lend force to compel their continuance. The most tenable ground for Mr. Bates's decision is, that the facts, as he found them, showed an active and officious, though not forcible, intervention by the authorities to encourage the negroes in leaving the vessel, and to discourage the master from using such means as he had to prevent it.]—D.

tribunals, taking cognizance of a charge of high treason against the persons found on board, after the vessel was compelled to put into port by stress of weather.(a)

§ 105. So also it has been determined by the Supreme Court of the United States, that the exemption of foreign public ships, coming into the waters of a neutral State, from the local jurisdiction, does not extend to their prize ships or goods captured by armaments fitted out in its ports, in violation of its neutrality, and of the laws enacted to enforce that neutrality.

Such was their judgment in the case of the Spanish ship *Santissima Trinidad*, from which the cargo had been taken out, on the high seas, by armed vessels commissioned by the United Provinces of the Rio de la Plata, and fitted out in the ports of the United States in violation of their neutrality. The tacit permission, in virtue of which the ships of war of a friendly power are exempt from the jurisdiction of the country, cannot be so interpreted as to authorize them to violate the rights of sovereignty of the State, by committing acts of hostility against other nations, with an armament supplied in the ports where they seek an asylum. In conformity with this principle, the court ordered restitution of the goods claimed by the Spanish owners, as wrongfully taken from them.(a)⁶³

The exemption of public ships from the local jurisdiction does not extend to their prize goods taken in violation of the neutrality of the country into which they are brought.

(a) Sirey, *Recueil Général de Jurisprudence*, tom. xxxii. partie i. p. 578.^[1] M. Dupin, aîné, has published his learned and eloquent pleading in this memorable case, in his *Collection des Réquisitoires*, tom. i. p. 447.^[11]

(a) Wheaton's Rep. vii. 352, *The Santissima Trinidad*.

[⁶³ It may be considered as established law, now, that the public vessels of a foreign State, coming within the jurisdiction of a friendly State, are exempt from all forms of process in private suits. Nor will such ships be seized, or in any way interfered with, by judicial proceedings in the name and by authority of the State, to punish violations of public laws. In such cases, the offended State will appeal directly to the other sovereign. Any proceeding against a foreign public ship would be regarded as an unfriendly if not hostile act, in the present state of the law of nations. Prizes made by a foreign vessel of war in violation of territorial rights, or when the capturing vessel had been fitted out in violation of neutrality, have been seized in admiralty on proceedings for restitution; but that is on the ground that the prizes were not vessels of war of the capturing State. If they shall have become such by actual transfer to that sovereign, and by an actual and *bonâ fide* setting-forth and commissioning as public vessels, they will not be so proceeded against by a municipal tribunal, but will have the immunity of public vessels. *The Exchange*, Cranch, vii. 116. See note 49, *infra*, on Neutrality or Foreign-Enlistment Acts. It has recently been decided by the Supreme Court of Massachusetts, that a citizen having a lien upon a vessel, which would have been enforceable had the vessel been private property, cannot proceed against her, if, after the lien attached, she became the property of the United States, and was held by the government as one of the instrumentalities by which it discharged its public duties. (See note 61, *supra*.) In the case before the court, the vessel was fitted out for a lightship, but, at the time of the suit, had not been put upon her station, and was still lying in a private dock. *Briggs v. The Lightships*,^[111] Allen's Rep. xi. In the opinion, the court says, 'The exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character.'

[¹ For *Recueil Général de Jurisprudence*, tom. xxxii. partie i. p. 578 read *Recueil Général des Lois et des Arrêts*, 1832, 1re partie, *Jurisprudence de la Cour de Cassation*, 578.]—G.G.W.

[¹¹ For 447 read 477.]—G.G.W.

[¹¹¹ For *Briggs v. The Lightships* read *Briggs and another v. Light-Boats*.]—G.G.W.

Jurisdiction
of the State
over its pub-
lic and pri-
vate vessels
on the high
seas.

[169] § 106. Both the public and private vessels of every nation, on the high seas, and out of the territorial limits of any other State, are subject to the jurisdiction of the State to which they belong.

Vattel says that the domain of a nation extends to all its just possessions; and by its possessions we are not to understand its territory only, but all the rights (*droits*) it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory. (a) Grotius holds that sovereignty may be acquired over a portion of the sea, *ratione personarum, ut si classis qui maritimus est exercitus, aliquo in loco maris se habeat*. But, as one of his commentators, Rutherford, has observed, though there can be no doubt about the jurisdiction of a nation over the persons who compose its fleets when they are out at sea, it does not follow that the nation has jurisdiction over any portion of the ocean itself. It is not a permanent property which it acquires, but a mere temporary right of occupancy in a place which is common to all mankind, to be successively used by all as they have occasion. (b)

[170] This jurisdiction which the nation has over its public and private vessels on the high seas, is exclusive only so far as respects offences against its own municipal laws. Piracy and other offences against the law of nations, being crimes not against any particular State, but against all mankind, may be punished in the competent tribunal of any country where the offender may be found, or into which he may be carried, although committed on board a foreign vessel on the high seas. (c)⁶⁴

Though these offences may be tried in the competent court of any nation having, by lawful means, the custody of the offenders, yet the right of visitation and search does not exist in time of peace. This

It seems now established, both in England and America, that no vessel or other property used by the government for public purposes, whether those purposes be military, fiscal, or of police, are subject to judicial proceedings, without the consent of the government, whether to enforce a lien, or an open claim, whatever be the nature of the demand. *Buchanan v. Alexander*, Howard, iv. 20. *Harris v. Dennie*, Peters, iii. 292; *The South Carolina*, Bee, 422. *The Lord Hobart*, Dodson, ii. 103. *The Comus*, cited in Dodson, ii. 464. *The Marquis of Huntley*,⁽¹⁾ Haggard, iii. 247. *The Merchant, Marvin on Salvage*,⁽¹¹⁾ § 122. *The Thomas A. Scott*, Law Times, N.S. x. 726. *The Athol*, W. Rob. i. 379. *The Birkenhead*, Notes of Cases, vi. 365. *The Resolute*, Law Times, xxxiii. 80. *Rogers v. Ragendro Dutt*, Moore, P. C. xiii. 236. *The Swallow*, Swabey, i. 30. *The Inflexible*, Ib. 32. *United States v. Barney*, Hall's Law Journal,⁽¹¹¹⁾ iii. 128. *Osborn v. Bank of U. States*, Wheaton's Rep. ix. 870. If this general rule of immunity is to be considered as established in municipal law in favor of the State, it may well be presumed that nations will be prepared to extend its benefits, on like principles, to the public property of friendly States.]—D.

(a) Vattel, liv. i. ch. 19, § 216, liv. ii. ch. 7, § 80.

(b) Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. iii. § 13. Rutherford's Inst. vol. ii. b. ii. ch. 9, §§ 8, 19.

(c) Sir L. Jenkin's Works, i. 714.

[⁶⁴ See note 83, *infra*, on Piracy.]—D.

[¹ For Huntley read Huntly.]—G.G.W.

[¹¹ For Marvin on Salvage read Marvin on Wreck and Salvage.]—G.G.W.

[¹¹¹ For Hall's Law Journal read Hall's American Law Journal.]—G.G.W.

right cannot be employed for the purpose of executing upon foreign vessels and persons on the high seas the prohibition of a traffic which is neither piratical nor contrary to the law of nations, (such, for example, as the slave-trade,) unless the visitation and search be expressly permitted by international compact.(d)⁶⁵

Every State has an incontestable right to the service of all its members in the national defence, but it can give effect to this right only by lawful means. Its right to reclaim the military service of its citizens can be exercised only within its own territory, or in some place not subject to the jurisdiction of any other nation. The ocean is such a place, and any State may unquestionably there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects. But whether it may exercise the same right in respect to the vessels of other nations, is a question of more difficulty.

§ 107. In respect to public commissioned vessels belonging to the State, their entire immunity from every species and purpose of search is generally conceded. As to private vessels belonging to the subjects of a foreign nation, the right to search them on the high seas, for deserters and other persons liable to military and naval service, has been uniformly asserted by Great Britain, and as constantly denied by the United States. This litigation between the two nations, who by the identity of their origin and language [171] are the most deeply interested in the question, formed one of the principal objects of the late war between them. It is to be hoped that the sources of this controversy may be dried up by the substitution of a registry of seamen, and a system of voluntary enlistment with limited service, for the odious practice of impressment which has hitherto prevailed in the British navy, and which can never be extended, even to the private ships of a foreign nation, without provoking hostilities on the part of any maritime State capable of resisting such a pretension.(a)

§ 108. The subject was incidentally passed in review, though not directly treated of, in the negotiations which terminated in the treaty of Washington, 1842, between the United States and Great Britain. In a letter addressed by the American negotiator to the British plenipotentiary on the 8th August, 1842, it was stated that no cause had produced to so great an extent, and for so long a period, disturbing and irritating influences on the political relations of the United States and England, as the impressment of seamen by the British cruisers from American merchant vessels.

(d) The *Louis*, Dodson's Adm. Rep. ii. 238. The *Antelope*, Wheaton's Rep. x. 122, 123. The *Marianna Flora*, Wheaton's Rep. xi. 39, 40; *et vide infra*, § 120 *et seq.*

[⁶⁵ See note 85, *infra*, on the Slave Trade.]—D.

(a) *Edinburgh Review*, xi. art. 1. Mr. Canning's Letter to Mr. Monroe, September 23, 1807.⁽¹⁾ *American State-Papers*, vi. 103.

[¹ *Insert Wait, before American State-Papers.*]—G.G.W.

From the commencement of the French revolution to the breaking out of the war between the two countries in 1812, hardly a year elapsed without loud complaint and earnest remonstrance. A deep feeling of opposition to the right claimed, and to the practice exercised under it, and not unfrequently exercised without the least regard to what justice and humanity would have dictated, even if the right itself had been admitted, took possession of the public mind of America; and this feeling, it was well known, co-operated with other causes to produce the state of hostilities which ensued.

At different periods, both before and since the war, negotiations had taken place between the two governments, with the hope of finding some means of quieting these complaints. Sometimes the effectual abolition of the practice had been requested and treated of; at other times, its temporary suspension; and, at other times, again, the limitation of its exercise and some security against its enormous abuses.

A common destiny had attended these efforts: they had all failed. The question stood at that moment where it stood fifty years ago. The nearest approach to a settlement was a conven[172]tion, proposed in 1803, and which had come to the point of signature, when it was broken off in consequence of the British government insisting that the 'Narrow Seas' should be expressly excepted out of the sphere over which the contemplated stipulations against impressment should extend. The American minister, Mr. King, regarded this exception as quite inadmissible, and chose rather to abandon the negotiation than to acquiesce in the doctrine which it proposed to establish.

England asserted the right of impressing British subjects. She asserted this as a legal exercise of the prerogative of the crown; which prerogative was alleged to be founded on the English law of the perpetual and indissoluble allegiance of the subject, and his obligation, under all circumstances, and for his whole life, to render military service to the crown whenever required.

This statement, made in the words of eminent British jurists, showed at once that the English claim was far broader than the basis on which it was raised. The law relied on was English law; the obligations insisted on were obligations between the crown of England and its subjects. This law and these obligations, it was admitted, might be such as England chose they should be. But then they must be confined to the parties. Impressment of seamen, out of and beyond the English territory, and from on board the ships of other nations, was an interference with the rights of other nations; it went, therefore, further than English prerogative could legally extend; and was nothing but an attempt to enforce the peculiar law of England beyond the dominions and jurisdiction of the crown. The claim asserted an extra-territorial authority for the law of British prerogative, and assumed to exercise

this extra-territorial authority, to the manifest injury of the citizens and subjects of other States, on board their own vessels, on the high seas.

Every merchant vessel on those seas was rightfully considered as part of the territory of the country to which it belonged. The entry, therefore, into such vessel, by a belligerent power, was an act of force, and was *primâ facie* a wrong, a trespass, which could be justified only when done for some purpose allowed to form a sufficient justification by the law of nations. But a British cruiser enters an American vessel in order to take therefrom supposed British subjects; offering no justification therefor under the law of nations, but claiming the right under the law of England respecting the king's prerogative. This could not be defended. English soil, English territory, English jurisdiction, was the appropriate sphere for the operation of English law. The ocean was the sphere of the law of nations; and any merchant vessel on the high seas was, by that law, under the protection of the laws of her own nation, and might claim immunity, unless in cases in which that law allows her to be entered or visited.

If this notion of perpetual allegiance, and the consequent power of the prerogative, were the law of the world; if it formed part of the conventional code of nations, and was usually practised, like the right of visiting neutral ships, for the purpose of discovering and seizing enemy's property; then impressment might be defended as a common right, and there would be no remedy for the evil until the international code should be altered.⁶⁶ But this was by no means the case. There was no such principle incorporated into the code of nations. The doctrine stood only as English law, not as international law; and English law could not be of force beyond English dominion. Whatever duties or relations that law creates between the sovereign and his subjects, could only be enforced within the realm, or within the proper possessions or territory of the sovereign. There might be quite as just a prerogative right to the property of subjects as to their personal services, in an exigency of the State; but no government thought of controlling, by its own laws, the property of its subjects situated abroad; much less did any government think of entering the territory of another power, for the purpose of seizing such property and appropriating it to its own use. As laws, the prerogatives of the crown of

[⁶⁶ But surely, on the question of the right to enter, and exercise authority on board of, a foreign vessel, to enforce a municipal demand, it is immaterial whether the demand, as it is not belligerent, be one which every nation recognizes as valid, or one which is peculiar to the nation enforcing it. It is not the validity of the demand, under municipal law or international law, that is in question, but the right to enforce it on board a foreign vessel. It is a question of territorial jurisdiction solely. And if, by the words 'usually practised, like the right of visiting neutral ships,' the author means, for the purpose of the argument, to assume impressment from foreign vessels to be, like the practice he refers to, a recognized right, he would seem to assume the question in dispute.]-D.

England have no obligation on persons or property domiciled or situated abroad.

'When, therefore,' says an authority⁽¹⁾ not unknown or unregarded on either side of the Atlantic, 'we speak of the right of a State to bind its own native subjects everywhere, we speak only of [174] its own claim and exercise of sovereignty over them, when they return within its own territorial jurisdiction, and not of its right to compel or require obedience to such laws on the part of other nations, within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its sovereign will⁽²⁾ and public polity.'

Impressment
of seamen—
continued.

§ 109. But impressment was subject to objections of a much wider range. If it could be justified in its application to those who are declared to be its only objects, it still remained true that, in its exercise, it touched the political rights of other governments, and endangered the security of their own native subjects and citizens. The sovereignty of the State was concerned in maintaining its exclusive jurisdiction and possession over its merchant ships on the seas, except so far as the law of nations justifies intrusion upon that possession for special purposes; and all experience had shown that no member of a crew, wherever born, was safe against impressment when a ship was visited.

In the calm and quiet which had succeeded the late war, a condition so favorable for dispassionate consideration, England herself had evidently seen the harshness of impressment, even when exercised on seamen in her own merchant service; and she had adopted measures, calculated if not to renounce the power or to abolish the practice, yet, at least, to supersede its necessity, by other means of manning the royal navy, more compatible with justice and the rights of individuals, and far more conformable to the principles and sentiments of the age.

Under these circumstances, the government of the United States had used the occasion of the British minister's pacific mission, to review the whole subject, and to bring it to his notice and to that of his government. It had reflected on the past, pondered the condition of the present, and endeavored to anticipate, so far as it might be in its power, the probable future; and the American negotiator communicated to the British minister the following, as the result of those deliberations.

The American government, then, was prepared to say that the practice of impressing seamen from American vessels could not hereafter be allowed to take place. That practice was founded on principles which it did not recognize, and was invariably attended [175] by con-

[¹ 'an authority' refers to Joseph Story, *Commentaries on the Conflict of Laws*, Chap. II, sec. 22.]—G.G.W.

[² For its sovereign read its own sovereign.]—G.G.W.

sequences so unjust, so injurious, and of such formidable magnitude, as could not be submitted to.

In the early disputes between the two governments, on this so long contested topic, the distinguished person to whose hands were first intrusted the seals of the Department of State, declared, that 'the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such.'⁽¹⁾

Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration of the whole subject when the passions were laid, and no present interest or emergency existed to bias the judgment, had convinced the American government that this was not only the simplest and best, but the only rule which could be adopted and observed, consistently with the rights and honor of the United States, and the security of their citizens. That rule announced, therefore, what would hereafter be the principle maintained by their government. In every regularly documented American merchant vessel, the crew who navigated it would find their protection in the flag which was over them.^(a)⁶⁷

(a) Wheaton's Hist. Law of Nations, 737-746. Mr. Webster's Letter to Lord Ashburton, August 8, 1842.

[⁶⁷ *Impressment of Seamen*.—This subject has been confused by the questions which have been discussed in connection with it. One of these is the conflicting claims of Great Britain and the United States to the allegiance of the naturalized seaman, growing out of the theory of inalienable allegiance asserted by the former nation and denied by the latter. But that is not a maritime question. Great Britain makes no claim to the inalienable allegiance of a seaman which it does not make to that of all other persons. Suppose the United States had conceded the general principle, that naturalization is powerless against the claim of an original sovereign,—it would not have touched the question where and how that claim should be asserted. As has been said before (note 66), the question is one of territorial jurisdiction, and not of merits. It presents itself in the same form if the seaman has never been naturalized. The question of territorial jurisdiction has also been obscured by connecting it with the admitted belligerent right of search and capture. The right in question has nothing to do with that belligerent right. The seaman is not an enemy, or contraband; nor is the vessel in which he is serving, or on board which he is a passenger, either violating neutrality, or engaged in the enemy's service. On the contrary, the ground of the demand is, that the seaman is a subject of the capturing power, and owes it allegiance and service, which it requires him to render. The demand is the same in principle upon all other persons as upon seamen, and upon men who left their country when infants as upon actual deserters from public service. It can be enforced in profound peace as well as during a war, if enforceable at all. And it is immaterial what the immediate object of the sovereign is in demanding his subject, whether to try him as a criminal or to put him to service, and to what service, and on what grounds due. Admitting the validity of the demand,—the question remains, whether it can be enforced on board the vessel of a friendly State at sea.

When the proposition is brought down to its strict limits, it is found to be this, and [176] no more: Can a State take from a merchant-vessel of a friendly State, at sea, a person on whom it has a sovereign claim, assumed to be valid? It is sufficient to state this proposition, to ensure its rejection. The truth is, the necessities of a great maritime belligerent led it to assert this claim to secure seamen for its fleets, at a time when the rules of maritime international law were not as well settled or understood as now; and when, perhaps, it was possible to cite some analogous practices occasionally enforced, and yielded to of necessity, in earlier times of still obscurer law. To make the claim less odious and more defensible on usage, it was limited

[¹ This quotation is from letter of Jefferson to Pinckney, 11 June 1792, 3 Jefferson's Works, 179.]—G.G.W.

Consular
jurisdiction.

[176] § 110. The municipal laws and institutions of any State may operate beyond its own territory, and within the territory of another State, by special compact between the two States.

to seamen who owed naval service to the State, and to times when the State was engaged in war. At last, to give it further countenance, it was disclaimed as a general right, even in such cases, and appended as an incident to the admitted belligerent right of search. In the royal declaration of 1812, on the occasion of the American war, the Prince Regent says it is not claimed that Great Britain can stop and search a foreign vessel to find and remove British seamen; but that it is claimed that, if, in the exercise of the right of belligerent search, a British seaman happens to be found on board, he may be removed. (Ann. Reg. 1813, p. 2.) It will be seen that this reduces the claim from one resting on a general principle to an exception from a principle, depending upon its incidental if not accidental quality to reverse its character into a right. To sustain it in this limited sense, a usage of nations must be shown; for no one will pretend, in this age of international law, that a belligerent cruiser, finding nothing that he can claim under laws of war, can, on closing his search and visit, take away with him all persons or things he may happen to find to which his State has a municipal claim. There is neither usage nor principle to that effect; nor would the practice now be tolerated nor probably asserted by any civilized nation. In the discussions that arose out of the case of the Trent, neither of the parties to the correspondence, and no writer on the subject, pretended that Mason and Slidell could be removed as citizens, rebels, or criminals. A right to take them out, as distinct from the arrest of the Trent, as a prize proceeding, was not claimed by the United States Government, and their release was placed on that ground. The only justification possible was one to be drawn from a probable ancient practice of taking enemies from neutral vessels; but that justification the United States declined to invoke, and no nation would probably now assert or admit it. See note 89,⁽¹⁾ *infra*, on Carrying Hostile Persons or Papers.

English writers, of late, have either been silent on the right of impressment, or have stated it in restricted terms, attached to no principle or usage, or have repudiated it. The claim was defended, in the last generation, in an article in the Edinburgh Review, xi. 22, as to which Professor Bernard says, 'The reviewer confounds a belligerent right, permitted by international law to be exercised over a neutral ship, with a claim to enforce English *municipal* law on board a foreign ship, which international law no more allows in time of war than in time of peace.' Notes on the Trent Case, 70. An article in the same Review, of January, 1862, admits that the right was municipal and not under the law of nations, and indirectly abandons it. A writer in the Quarterly Review, of January, 1862, says, 'We imputed to the ships in which those sailors might be found no breach of neutrality, and consequently we had no right to take them before a prize court; and therefore, if the right was to be exercised⁽¹¹⁾, it was necessary that it should be exercised by our naval officers. . . .⁽¹¹¹⁾ But we do not undertake to justify our^(1v) acts half a century ago. The law of impressment has been abolished; and it is very certain, that, during the last fifty years, nothing of the kind has been attempted, or even imagined, by England. The law of nations is deduced from the actual practice of nations; and, as during^(v) our last war (though sorely in need of sailors) we^(vi) did not revive our claim to take our sailors out of American ships, the claim must be held to have been conclusively abandoned.' Phillimore dismisses the subject with a single, unintelligible remark,—that 'the right to look for subjects on the high seas,' and to 'search neutral vessels for deserters and other persons liable to military or naval service, *ought to be confined in its exercise to merchant vessels.*'^(vii)

[¹ For 89 read 228.]—G.G.W.

[¹¹ After exercised insert at all.]—G.G.W.

[¹¹¹ Omit . . .]—G.G.W.

[^{1v} For justify our read justify all our.]—G.G.W.

[^v For as during read as we during.]—G.G.W.

[^{vi} Omit we.]—G.G.W.

[^{vii} The quotation mentioned is as follows: 'England, on the other hand, has asserted the right to look for her subjects on the high seas, into whatever service they may embark. The claim of England to the Right of Search, on the high seas, of neutral vessels, for deserters and other persons liable to military and naval service, has been a question of animated discussion between her and the United States of North America. It was one principal cause of the war of 1812 between these States, and remains unsettled to this day; in the discussions in 1842, between Lord Ashburton and Mr. Webster, relative to the boundary line of the State of Maine, the American Minister incidentally discussed the subject; but no conclusion was arrived at. It appears clear to the writer of these pages, that in the present state of International Law, this Right of Search *ought* to be confined in its exercise to merchant vessels.' 3 Phillimore, Commentaries upon International Law, § 335, ed. 1857. Later editions of Phillimore pronounced the claim 'untenable'.]—G.G.W.

[177] Such are the treaties by which the consuls and other commercial agents of one nation are authorized to exercise, over their own countrymen, a jurisdiction within the territory of the State where they reside. The nature and extent of this peculiar jurisdiction depend upon the stipulations of the treaties between the two States. Among Christian nations it is generally confined to the decision of controversies in civil cases, arising between the merchants, seamen, and other subjects of the State, in foreign countries; to the registering of wills, contracts, and other instruments executed in presence of the consul; and to the administration of the estates of their fellow-subjects, deceased within the territorial limits of the consulate. The resident consuls of the Christian powers in Turkey, the Barbary States, and other Mohammedan countries, exercise both civil and criminal jurisdiction over their countrymen, to the exclusion of the local magistrates and tribunals. This jurisdiction is ordinarily subject, in civil cases, to an appeal to the superior tribunals of their own country. The criminal jurisdiction is usually limited to the infliction of pecuniary penalties; and, in offences of a higher grade, the functions of the consul are similar to those of a police magistrate, or *juge d'instruction*. He collects the documentary and other proofs, and sends them, together with the prisoner, home to his own country for trial.^(a)

[178] By the treaty of peace, amity, and commerce, concluded at Wang Hiya, 1844, between the United States and the Chinese Empire, it is stipulated, art. 21, that 'citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul, or other public functionary of the United States thereto authorized, according to the laws of the United States.' Art. 25. 'All questions in regard to rights, whether of property or of⁽¹⁾ person, arising between citizens of the United States in China, shall be subject

Intern. Law, § 335. Mr. Webster, in 1842, closed the correspondence with Lord Ashburton on the subject, by the declaration that 'the American Government is⁽¹¹⁾ prepared to say that the practice of impressing seamen from American vessels, cannot hereafter be allowed to take place.' Webster's Works, vi. 325. It was, indeed, high time that the subject should be put beyond the pale of juridical or diplomatic discussion.

For the diplomatic history of this subject, see Wait's American State-Papers, vi. 323, 368. Rush's Residence in London, 432. Mr. Madison to Mr. Rose, March 1⁽¹²⁾, 1808. Parliamentary Papers, 1809, 29.⁽¹³⁾ Mr. Adams to Mr. Rush, July 28, 1823. Sen. Doc. 18th Cong. 2d. Sess. Mr. Gallatin to Mr. Clay, July 28, 1827. Mr. Clay to Mr. Barbour, June 13, 1828. Ex. Doc. 111, 33d Cong. 1st Sess. Mr. Seward to Lord Lyons, Dec. 26, 1861.—D.

(a) De Steck, Essai sur les Consuls, sect. vii. § 30-40. Pardessus, Droit Commercial, Part VI. tit. 6, ch. 2, § 2; ch. 4, §§ 1, 2, 3. Miltitz, Manuel des Consuls, tom. ii. Part II. pp. 70-78, 102-135, 162-201, 695-779, 853-866. The various treaties between the United States and foreign powers, by which the functions and privileges of consuls are reciprocally regulated, will be found accurately enumerated and fully analyzed in the above treatise of Baron de Miltitz, tom. ii. Part. II. pp. 1498-1598.

[¹ Omit of.]—G.G.W.

[¹¹ For Government is read Government, then, is.]—G.G.W.

[¹² For 1 read 5.]—G.G.W.

[¹³ For 29 read 93.]—G.G.W.

to the jurisdiction, and regulated by the authorities, of their own government. And all controversies occurring in China, between citizens of the United States and the subjects of any other government, shall be regulated by the treaties existing between the United States and such governments respectively, without interference on the part of China.⁶⁸

Independence of the State as to its judicial power.

[179] § III. Every sovereign State is independent of every other, in the exercise of its judicial power.

This general position must, of course, be qualified by the exceptions to its application, arising out of express compact, such as conventions with foreign States, and acts of confederation, by which the State may be united in a league with other States, for some common purpose. By the stipulations of these compacts, it may part with certain portions of its judicial power, or may modify its exercise with a view to the attainment of the object of the treaty or act of union.

§ 112. Subject to these exceptions, the judicial power of every State is co-extensive with its legislative power. At the same time, it does not embrace those cases in which the municipal institutions of another nation operate within the territory. Such are the cases of a foreign sovereign, or his public minister, fleet, or army, coming within the territorial limits of another State, which, as already observed, are, in general, exempt from the operation of the local laws.(a)

[⁶⁸ Abbott's United States Consul's Manual, 1863, gives the treaties, statutes, and regulations bearing upon the rights and duties of consuls. The general principle runs through our treaties, that consuls shall take jurisdiction over questions of wages, shipment, and discharge of seamen, and over all transactions occurring on board vessels of the United States lying in a foreign port, whether in the nature of contracts, torts, or crimes, so far as they concern only the vessels and their cargoes and the persons belonging on board. If they concern the public peace of the country, or the rights of persons not belonging on board, they are subjects of local jurisdiction. In many of the treaties, consuls are permitted to take possession of the personal effects and estates of deceased citizens of their respective countries, and administer upon them, or send them home for administration. There are also provisions authorizing consuls to take depositions and authenticate documents, and making consular copies evidence in judicial proceedings. In some treaties, consuls are permitted to arrest deserters from public or private ships, through the local magistrates; and, in such cases, the local processes for arrest, and places of detention and imprisonment, are placed at the disposal of the consul. Provisions are made in the treaty with France authorizing the intervention of consuls, and directing notice to them, in cases of salvage of vessels or cargoes of their respective countries. There are no treaty stipulations between the United States and Great Britain respecting the arrest and detention of deserting seamen. The last attempt at such an arrangement failed because of Great Britain's desiring to exclude slaves from the treaty, which was objected to by the United States. Mr. Cass to Mr. Dallas, Oct. 8, 1860. See treaties with France (United-States Laws, x. 992), Prussia, Portugal, Belgium, Netherlands, Russia, Sardinia, Spain, Austria, Sweden, Two Sicilies, the Hanseatic Towns; and with Mexico, and all the States of South America, Morocco, Turkey, China, Algiers, and Tunis (United-States Laws, viii. ix. x.): also, act of March 2, 1829, Ib. x. ⁽¹⁾ 360, and treaties with Japan, United-States Laws, xi. 723, Persia, Ib. 709, Siam, Ib. 683.]—D.

(a) *Vide supra*, § 95.

[¹ For x. read iv.]—G.G.W.

§ 113. The judicial power of every independent State, then, extends, with the qualifications mentioned,—

Extent of
the judicial
power over
criminal
offences.

1. To the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory.(a)

2. To the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports.(b)

3. To the punishment of all such offences by its subjects, wheresoever committed.

4. To the punishment of piracy, and other offences against the law of nations, by whomsoever and wheresoever committed.(c)

It is evident that a State cannot punish an offence against its municipal laws, committed within the territory of another State, unless by its own citizens; nor can it arrest the persons or property of the supposed offender within that territory; but it may arrest its own citizens in a place which is not within the jurisdiction of any other nation, as the high seas,⁶⁹ and punish them for offences [180] committed within such a place, or within the territory of a foreign State.

By the common law of England, which has been adopted, in this respect, in the United States, criminal offences are considered as altogether local, and are justiciable only by the courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence of Great Britain and the United States; and even in these two countries it has been frequently disregarded by the positive legislation of each, in the enactment of statutes, under which offences committed by a subject or citizen, within the territorial limits of a foreign State, have been made punishable in the courts of that country to which the party owes allegiance, and whose laws he is bound to obey. There is some contrariety in the opinions of different public jurists on this question; but the preponderance of their authority is greatly in favor of the jurisdiction of the courts of the offender's country, in such a case, wherever such jurisdiction is expressly conferred upon those courts, by the local laws of that country. This doctrine is also fully confirmed by the international usage and constant legislation of the different States of the European continent, by which crimes in general, or certain specified offences against the municipal code, committed by a citizen or subject in a foreign country, are made punishable in the courts of his own.(d)⁷⁰

§ 114. Laws of trade and navigation cannot affect foreigners, beyond the territorial limits of the State, but they are binding upon

Laws of
trade and
navigation.

(a) Ibid. § 84.

(b) Ibid. §§ 95, 106.

(c) *Vide infra*, § 120 *et seq.*

[⁶⁹ The author does not mean to include an arrest on the high seas from a vessel of another nation against its consent.]-D.

(d) Foelix, *Droit International Privé*, §§ 510-532. See *American Jurist*, xxii. 381-386.

[⁷⁰ Story's *Conflict of Laws*, §§ 619-625.]-D.

its citizens, wherever they may be. Thus, offences against the laws of a State prohibiting or regulating any particular traffic, may be punished by its tribunals, when committed by its citizens, in whatever place; but if committed by foreigners, such offences can only be thus punished when committed within the territory of the State, or on board of its vessels, in some place not within the jurisdiction of any other State.⁷¹

Extradition
of criminals.

§ 115. The public jurists are divided upon the question, how far a sovereign State is obliged to deliver up persons, whether its own subjects or foreigners, charged with or con[181]victed of crimes committed in another country, upon the demand of a foreign State, or of its officers of justice. Some of these writers maintain the doctrine, that, according to the law and usage of nations, every sovereign State is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the government of that country within whose jurisdiction the crime has been committed. Such is the opinion of Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing, and Kent.^(a) According to Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer,⁽ⁱ⁾ and Heffter, on the other hand, the extradition of fugitives from justice is a matter of imperfect obligation only; and though it may be habitually practised by certain States, as the result of mutual comity and convenience, requires to be confirmed and regulated by special compact, in order to give it the force of an international law.^(b) And the learned Mittermeyer⁽ⁱ⁾ considers the very fact of the existence of so many special treaties respecting this matter as conclusive evidence that there is no such general usage among nations, constituting a perfect obligation, and having the force of law properly so called. Even under systems of confederated States, such as the Germanic Confederation and the North American Union, this obligation is limited to the cases and conditions mentioned in the federal compacts.^(c)⁷²

[⁷¹ Story's Conflict of Laws, § 625, *a, b.*]—D.

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. xi.⁽¹¹⁾ §§ 3-5. Heineccius, Prælect. in Grot. j. t.⁽¹¹¹⁾ Burlamaqui, tom. ii. Part IV. ch. 3, §§ 23-29. Vattel, liv. ii. ch. 6, §§ 76, 77. Rutherford, Inst. of Nat. Law, ii. ch. 9, p. 12.^(1v) Schmelzing, Systematischer Grundriss des praktischen europäischen Völkerrechts, § 61.^(v) Kent's Comm. i. 36, 37, 5th edit.

(b) Puffendorf, Elementa, lib. viii. cap. 3, §§ 23, 24. Voet, de Stat. § 11, cap. 1, No. 6. Martens, Droit des Gens, liv. iii. ch. 3, § 101. Klüber, Droit des Gens, Part II. tit. 1, ch. 2, § 66. Leyser, Meditationes ad Pandect., Med. 10. Kluit, De Deditione Profugorum, § 1, p. 7. Saalfeld, Handbuch des positiven Völkerrechts, § 40. Schmaltz, Europäisches Völkerrecht, p. 160. Heffter, Europäisches Völkerrecht, § 63. Mittermaier, Deutsches^(v1) Strafverfahren, Theil i. § 59, pp. 314-319.

(c) Mittermaier, Ibid.

[⁷² This statement, without explanation, might give to a foreign reader an imperfect

[¹ For Mittermeyer read Mittermaier.]—G.G.W.

[¹¹ For xi. read xxi.]—G.G.W.

[¹¹¹ For Praelect. in Grot. j. t. read Praelectiones Academicæ in Hugonis Grotii de Jure Belli et Pacis.]—G.G.W.

[^v For § 61 read § 161.]—G.G.W.

[^{1v} For p. 12. read § 12.]—G.G.W.

[^{v1} For deutsches read deutsche.]—G.G.W.

[182] The negative doctrine, that, independent of special compact, no State is bound to deliver up fugitives from justice upon the demand of a foreign State, was maintained at an early period by the United States government, and is confirmed by a considerable preponderance of judicial authority in the American courts of justice, both State and Federal.^(d)⁷³

notion of American criminal jurisprudence. For crimes over which the courts of the general government have jurisdiction, a fugitive may be arrested by warrants from the federal courts, in any part of the Union. For crimes solely against the laws of a State and triable only by the State tribunals, the fugitive can be arrested in another State only by the authority of the State in which he is found. But the Constitution requires each State to make such arrests, and does not limit the obligation to particular cases, but extends it to all fugitives from justice, 'charged with⁽¹⁾ treason, felony, or other crime,' as stated below, in the text.]-D.

(d) See Mr. Jefferson's Letter to M. Genet, Sept. 12, 1793. The decision of Mr. Chancellor Kent, in *re* Washburn, Johnson's Ch. Rep. iv. 166,⁽¹¹⁾ is counterbalanced by that of Chief Justice Tilghman in *Respublica*⁽¹¹¹⁾ *v.* Deacon, Sergeant & Rawle's Rep. x. 125; by that of Mr. Chief Justice Parker, in *Respublica*⁽¹¹¹⁾ *v.* Green, Massachusetts Rep. xvii. 515-548; and by the judgment of the Supreme Court of the United States, in *Holmes v. Jennison*, Peters's Rep. xiv. 540.

[⁷³ *Extradition*.—It may be considered as settled in the United States, that, in the absence of positive law conferring the power upon a judicial tribunal, that tribunal has no authority, by virtue of its general functions, to make extradition of criminals. This results from the fact that there is no obligation upon a government, under the law of nations, to surrender fugitive criminals to a foreign power; and, consequently, it is a political and not a judicial question, whether extradition shall be made,—a question depending on reasons of state, and not upon rules of law. There is not only no obligation upon a government to make extradition, but, since treaties upon that subject have become so common, it is not the custom to ask for extradition in the absence of a treaty, or in a case which the treaty does not cover. The fact that two nations have made no arrangement on the subject, may fairly be considered as precluding a demand on either side. Although there is no obligation in the absence of a treaty, a State may, in view of its own policy, refuse asylum to fugitive criminals of certain classes, or remove them from its territory. How it will do this, in what cases, and by the agency of what functionaries, is purely a matter of municipal law. Whether the State will surrender fugitive criminals without a treaty, or will make a compact for the purpose, is to be decided by the political department of the government. The United States have treaties of extradition with nearly all civilized nations. These treaties have the common feature of never including, and usually expressly excluding, surrender for political or military offences, or offences triable by military or summary courts, and of not including petty crimes or misdemeanors. It has been decided, as matter of constitutional law, that a treaty does not, by its own force, give jurisdiction to all courts and magistrates, but that an act of Congress is necessary to authorize a court or magistrate to act under the treaty. As the surrender is a political act of the State, the function of a court or judicial magistrate is only to determine judicially whether a case has been made out in accordance with the treaty invoked and with the statute. Not only is the surrender to the foreign officer an executive act, but the original arrest may always be made by the executive; and, if the statute so provides, it may also be made by the court or the examining magistrate. By the Constitution, whatever under a treaty of extradition is an executive act, the President may do, or the Secretary of State as his agent, without an enabling statute. The statutes to carry treaties of extradition into effect have been made and construed in accordance with these principles. They authorize certain courts and magistrates, upon complaint made, to issue warrants of arrest; to hear and decide the question; and, if a case for surrender is made out, to certify the result, together with the evidence, to the Secretary of State; and the Secretary is authorized, thereupon, to make the extradition. The statutes do not undertake to compel the Secretary to do so, as the case [183] becomes then rather diplomatic

¹ For charged with *read* charged in any state with.]-G.G.W.

¹¹ For 166 *read* 106.]-G.G.W.

¹¹¹ For *Respublica* *read* Commonwealth.]-G.G.W.

[183] § 116. The Constitution of the United States provides, (art. 4, s. 2,) that 'a person charged in any State with treason, felony, or

and international. The legislature interposes the judicial inquiry as a condition to the surrender under a treaty, but does not give the judicial magistrate power to require a surrender.

The question still remains, whether, in the absence of treaties and statutes, the executive can surrender a fugitive criminal. The general tone of the judicial decisions and of political debate has been adverse to such a right; yet it was exercised in a remarkable case in 1864,—that of Arguelles. This person, being governor of a district in Cuba in which a cargo of Africans had been landed from a slave-ship and set free by the authorities, had reported officially to the government that one hundred and forty-one of them had died of small-pox; but it was discovered that he had sold them into slavery while in his charge, for large sums, with the aid of forged papers, and had escaped to New York. There was no treaty of extradition between Spain and the United States; but the Captain-General of Cuba and the Spanish Minister laid the matter before the Secretary of State, and requested the arrest and surrender of Arguelles, as an act of favor and comity, not only on account of the enormity of his offence, but because his presence in Cuba was found necessary to the liberation of the men he had sold into slavery. Mr. Seward, with the sanction of the President, ordered the arrest, as a purely executive act; and Arguelles was delivered to a special agent of the Spanish Government, and by him taken to Cuba. The Senate, on the 28th May, 1864, adopted a resolution requesting the President to inform them whether such a surrender had been made, and, if so, under what authority of law or treaty it was done. The President transmitted a reply, covering a report from the Secretary of State, and the documents showing the guilt of Arguelles, and the request of the Spanish Government. Mr. Seward, in his report, says: 'There being no treaty of extradition between the United States and Spain, or^[1] any act of Congress directing how fugitives from justice in Spanish dominions shall be delivered up, the extradition in this case^[11] is understood by this department to have been made in virtue of the law of nations and the Constitution of the United States. Although there is a conflict of authorities concerning the expediency of exercising comity towards a foreign government, by surrendering at its request one of its own subjects charged with the commission of crime within its territory, and although it may be conceded that there is no national obligation to make such a surrender upon a demand therefor, unless it is acknowledged by treaty or by statute law, yet a nation is never bound to furnish asylum to dangerous criminals, who are offenders against the human race; and it is believed that if in any case the comity could with propriety be practised, the one which is understood to have called forth the resolution furnished a just occasion for its exercise.' U. S. Dip. Corr. 1864, Part II. 60-74; Cong. Globe, 1864.

A resolution introduced into the House of Representatives, condemning this act, as a violation of the Constitution and in derogation of the right of asylum, was rejected by a large majority, and the subject referred to a committee; but it was followed by no action of Congress. An indictment was found in New York against the officer who made the arrest under the Secretary's warrant, on a charge of kidnapping, but the case has not been adjudicated; and, as no petition for *habeas corpus* was filed in behalf of Arguelles before his removal from the country, the legality of the act of the Secretary has not been judicially passed upon.

Upon the matters embraced in this note, see U. S. Laws, viii. Treaties, U. S. Laws, ix. 302; Ib. xii. 84. United States v. Davis, Sumner, ii. 482. Kane's^[11] case, Howard, xiv. 103. Metzger's case, N. Y.^[1v] Legal Obs. 83; Barb. i. 248; Howard, v. 176. Heilbron's case, Parker, C. R., i. 429. Holmes v. Jennison, Peters, xiv. 40.^[v] Holmes's case, Vermont R. xii. 631. Robbins's (Nash's) case, Wharton's State Trials, 392-456; and Bee, 267. Washburn's case, 4 Johns's Ch. Rep. iv. 106; Wharton's C. R. T. R. iii. 473. Veremaitre's case, Am. Law Journ. iii. 438. The British Prisoners, Woodb. and M. i. 67. Dos Santos's case, Brock. ii. 493. United States v. Stowell, Curtis, ii. 160. Opinions of Attorney-General, i. 384-392; ii. 832, 902; vi. 85, 91, 217, 227, 237, 270, 290, 431; vii. 6, 285, 536, 612. Halleck's Intern. Law, 174. Gardner's Institutes, 153-170. Mr. Webster to Lord Ashburton on the case of The Creole, Webster's Works, vi. 305. Ortolan, Regl. Intern. liv. ii. ch. 14. Klüber, europ. Völkr. § 86.^[vi] Heffter, europ. Völkr. § 63. Philli-

[1 For or read nor.]—G.G.W.

[11 For this case read the case referred to in the resolution of the Senate.]—G.G.W.

[111 For Kane's read Kaine's.]—G.G.W.

[v For 40. read 540.]—G.G.W.

[1v Insert 5 before Legal.]—G.G.W.

[vi For 86 read 66.]—G.G.W.

other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.'

[184] § 117. By the 10th article of the treaty concluded at Washington on the 9th August, 1842, between the United States and Great Britain, it was 'agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons, who, being charged with the crime of murder, or assault with intent to commit murder, or piracy,⁷⁴ or [185] arson, or robbery, or

Extradition
under the
Ashburton
Treaty.

more's Intern. Law, i. §§ 360-385. Woolsey's Elements,⁽¹⁾ § 79. Story's Conflict of Laws, §§ 626-628. Correspondence between Earl Russell and Mr. Adams on The Emily St. Pierre, U. S. Dipl. Corr. 1862. (See note, *infra*, Rescue by Neutrals.) Nations bound by treaties of extradition must still have the right to protect themselves against being defrauded of their right to give asylum. If, for instance, a political refugee, an escaped slave, or a deserter from military service, has asylum by the practice of a nation, it will look behind the mere formal proofs of a crime committed by such a person, to see that the real object is not to get possession of him for a purpose to which the treaty does not apply. In many cases, the government of the country making the demand may not be cognizant of the motives of parties who have procured an indictment, and set on foot the proceedings for surrender.

Before the abolition of slavery in the United States, demands were sometimes made on a free State, under the extradition clause in the Constitution, for surrender, on a charge of larceny, of a colored man who had fled from slavery,—the charge being perhaps for stealing a horse with which he made his escape; and the free States have refused the surrender, when satisfied that the real object was to reduce the man to slavery.]—D.

[⁷⁴ 'Piracy' in Extradition Treaties.—The meaning of the word 'piracy' in this treaty has received a construction by the Court of Queen's Bench in England, in the case of the crew of the *Gerity*.⁽¹¹⁾ (*Tirnan's*⁽¹¹¹⁾ case, Best & Smith, v. 643.) The American schooner *Gerity*⁽¹¹⁾ sailed from Matamoras, in November, 1863, with a cargo of cotton, bound to New York. Six or more men embarked in her as passengers, and, when about seventy miles out at sea, rose and took possession of the vessel, set the master adrift in a boat, took the vessel to British Honduras, and, after selling the cargo, abandoned her. Three of these men, being at Liverpool, were arrested by a warrant issued by a commissioner under the treaty of extradition of 1842, by direction of a Secretary of State, at the request of the United States Minister. The prisoners contended that they were acting under authority of the Confederate States, whom Great [185] Britain had recognized as belligerent, and that their act was not triable as a crime. The magistrate held that their act was *prima facie* the crime of piracy, and that the defence of belligerent authority was one to be made at their trial, and held them for extradition. A writ of *habeas corpus* was issued from the Queen's Bench, May, 1864; and, on the return, the cause was elaborately argued by counsel instructed respectively by the United States Minister, and by the agent of the Confederate States, who came forward to adopt the act. The court were unanimous in the opinion that there was sufficient evidence to warrant the magistrate in holding the prisoners, and that their defence of belligerency was properly to be made on their trial; and that the act, if a crime and not an act of war, was piracy *jure gentium*, and triable in England. The only question then was, whether it was within the legal authority of the magistrate to deliver up a person for a crime which each country had jurisdiction to try. The majority of the court, the Lord Chief Justice dissenting, held that the case did not come within the terms of the treaty and of the act of 6 & 7 Victoria, ch. 76, providing for its execution. Justices Crompton, Blackburn, and Shee held that the treaty was intended to apply only to crimes justifiable by one country, and not by the other. They drew this conclusion from the words of the treaty, 'committed within the jurisdiction of either,' . . . 'seek an asylum, or shall

[¹ For Elements read Introduction.]—G.G.W.

[¹¹ For *Gerity* read *Gerrity*.]—G.G.W.

[¹¹¹ For *Tirnan's* read *Tivnan's*.]—G.G.W.

forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: Provided, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there⁽ⁱ⁾ committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively,—to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitives.⁽ⁱⁱ⁾ The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive.’⁷⁵

be found within the territories of the other;’ from the preamble of the Act, ‘committed within the jurisdiction of the United States,’ and ‘found within the territories of Her Majesty,’ and the words, ‘fugitive,’ ‘deliver up to justice;’ and from the probability that the contracting parties would desire to provide only for cases which the nation making the demand had jurisdiction to try and the other nation had not. It was admitted that the word ‘piracy’ in the treaty, if it could mean only piracy *jure gentium*, triable anywhere, would be against this construction; but it was held that the word was introduced to meet acts made piracy by the statute law of America, not being so *jure gentium*, and of which the United States would have exclusive jurisdiction, as by the acts of 30 April, 1790, and 5 May, 1820. The Lord Chief Justice Cockburn was of opinion that the treaty and statute of 6 & 7 Victoria were not necessarily confined to crimes of which the nation making the demand had exclusive jurisdiction; that it might be applicable, for instance, to certain offences committed in a foreign territory by British subjects against other British subjects, or against the State, which either nation could try, but which, in respect of testimony or otherwise, could be more conveniently and justly tried in the country where the act was done. ‘Within the jurisdiction’ did not necessarily mean ‘exclusive’ jurisdiction; and, if it did, it referred to the area over which the laws of the particular State prevail; and that a ship is constructively such a place, and within the jurisdiction of the State. He saw no objection to including in the treaty piracy *jure gentium*, for the like reasons of convenience and justice. Piracy *jure gentium* would be committed ‘within the jurisdiction,’ not exclusive, of the demanding nation, if committed on board one of its vessels at sea. Professor Abdy, in his recent edition of Kent’s Intern. Law, 441-2,⁽ⁱⁱⁱ⁾ considers the opinion of the Lord Chief Justice to have been the more correct interpretation of the statute and treaty.]—D.

[⁷⁵ *Judicial Construction of Extradition Treaties*.—The points raised and decided in the Gerty^(iv) Case are given in note 74, *supra*. The point actually decided was, that the word ‘piracy,’ in the Ashburton treaty, did not include piracy *jure gentium*, but was confined to acts made piracy by the municipal law. The main reason given was, that a nation could not be presumed to promise extradition of criminals whom it had itself jurisdiction to try, equally with the nation demanding extradition.

Windsor’s Case.—This case was before the Queen’s Bench, April 27, 1865. Windsor was

[ⁱ For had been there read had there been.]—G.G.W.

[ⁱⁱ For fugitives read fugitive.]—G.G.W.

[ⁱⁱⁱ For 441-2 read 411-12.]—G.G.W.

[^{iv} For Gerty read Gerrity.]—G.G.W.

[187] § 118. By the convention concluded at Washington on the 9th November, 1843, between the United States and France, it was agreed:

‘ART. I. . . that the high contracting parties shall, on requisitions

arrested for extradition under the treaty, as a person ‘charged with forgery’ in New York. The acts done by him were false entries, for the purpose of defrauding, in books of account of a bank, kept by him as its clerk. By a statute of New York, it is provided that a person convicted of such acts shall be ‘adjudged guilty of forgery.’ The court was satisfied that there was sufficient evidence of his guilt under that statute to require extradition, if the offence came within the treaty; and it was conceded by the counsel for the requisition that the acts done would not be forgery by the common law, or by the statute law of England, or by the laws of the American States generally. The only question was, whether the treaty providing for extradition of persons charged with ‘forgery’ covered this case. The Lord Chief Justice said: ‘The act is restricted to cases which have the essential and substantial elements of the offences specified, and according to the law of both countries; and the mere fact that an act which, according to the general law of either country, has not the character of a particular offence, is treated as such by the law of one of them, does not bring the case within such a treaty as this. We must assume that the terms employed are used in a sense which they would have in the law of both countries, and not in a sense wholly peculiar to some local law in one of them.’^[1] Mr. Justice Blackburn said: ‘It must be taken that the terms were used in a sense common to both parties to the treaty. The mere fact that the law of one country, or of one part of it, described an act as being an offence which, in its own nature, in any sense common to both countries, it was not, did not bring the case within the treaty. This act was not really forgery; and what the State of New York had enacted was, that it should be punished as forgery.’^[2] Mr. Justice Shee being of the same opinion, the prisoner was released.

Anderson’s Case.—Anderson was a slave by the law of Missouri, and killed a white citizen of that State who endeavoured to arrest him while he was making his escape from Missouri. By the law of Missouri, any citizen may arrest a slave found beyond [187] limits without a pass. He succeeded in reaching Canada, and was demanded, under the treaty, as a person ‘charged with murder.’ The objection made was, that the act done by Anderson was not murder by the law of England or the common law, inasmuch as, slavery not being allowed by those laws, the killing of a person who attempted to reduce another to slavery, or to retain him in slavery by force, was justifiable or excusable. Reliance was placed especially on the language of the tenth article of the treaty,—‘provided that this [extradition] shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall^[3] be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed.’ The majority of the judges of the Queen’s Bench of Upper Canada sustained the requisition; while the Court of Common Pleas of Canada held that the act did not come within the treaty, and discharged the prisoner. The principle, therefore, has had no authoritative decision.

The question is an interesting one. Assuming that the offence charged must have the substantial elements of that offence by the general law of both countries, still Missouri had no new or peculiar law of murder. The definition of the offence was the same there as in Canada; and the same general rules of evidence and instructions to the jury would be applied to the facts in each country. In each, the rule would be, that the knowingly and intentionally killing by the prisoner of a person who had a legal right to arrest him, in wilfully resisting the arrest, is murder, in the absence of sufficient provocation to reduce it to manslaughter. The point where the law of the two countries would differ is, as to the right to make the arrest in the particular case, and the consequent illegality of resisting it. The right of the deceased to arrest the prisoner grew out of the slave system; but it was part of the law touching the relations of inhabitants to each other and to the public, which each nation must regulate for itself, and which existed when the treaty was made. If two nations have an identical code as to murder, and as to the mode of trial and the rules of evidence, there may yet be great diversities

[1 The quotations here given from the Lord Chief Justice and from Mr. Justice Blackburn are not in the language of the judgment as given in 6 Best and Smith [1865] 522.]—G.G.W.

[2 For shall read should.]—G.G.W.

made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following article, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other: *Provided*, That this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country, in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

[188] 'ART. 2. Persons shall be so delivered up who shall be charged, according to the provisions of this convention, with any of the following crimes, to wit: murder, (comprehending the crimes designated in the French penal code by the terms, assassination, parricide, infanticide, and poisoning,) or with an attempt to commit murder, or with rape, or with forgery, or with arson, or with embezzlement by public officers, when the same is punishable with infamous punishment.

'ART. 3. On the part of the French government, the surrender shall be made only by authority of the Keeper of the Seals, Minister of

in the systems of the two nations, resulting in rights to use force, or to resist the use of force, in one, directly opposite to what would exist in the other. Can this state of things be fairly held to constitute a difference in the substantial elements of the offence in the laws of the two countries? Does it not rather address itself to the policy of the two countries in making treaties of reciprocal extradition, calling for exceptions or qualifications? As to the clause of the [188] tenth article of the Ashburton treaty, there can be little doubt that it relates to the *quantum* of proof. It is found, in the same words, in Jay's treaty of 1794, art. 27. It is inserted to meet the question how much proof the examining magistrate is entitled to require. It might have been contended that the proof must be such as would be required to convict, and such as to remove all reasonable doubt of guilt; or that it must be such as to create a preponderance of belief, as, in a civil suit; or that the showing of that probable cause to believe guilt would be sufficient, which, by the rule of the common law, authorizes an examining magistrate to commit for trial. Instead of attempting to settle and define these degrees of proof, the parties adopted the rule which the country called upon to make the surrender should have established for its examining magistrates, in case of offences committed within its jurisdiction. In Anderson's case, the facts were sufficiently proved, and the only question was one lying behind the words of the treaty. Supposing an examining magistrate in Canada, in case of an offence committed there, is satisfied that the prisoner before him intentionally killed a person who was attempting to exercise an act of force upon him, and the question whether the homicide was murder or self-defence depended upon the relative rights of the parties to do or resist the attempted act, the magistrate would commit him for trial, unless the law in that respect was settled and clearly in favor of the prisoner. The doubt as to the law, in a clear state of facts, leaves that condition of things denominated probable cause to believe the prisoner guilty,—in other words, leaves a state of things proper for judicial investigation. If the same magistrate, sitting for extradition in a clear case of homicide, should be satisfied that the law respecting homicide was identical in the two countries, but that there would be a right to do the act attempted in Missouri and a right to resist it in Canada, could he refuse to commit the prisoner on the sole ground that there was a lack of sufficient evidence to establish a probable cause? Suppose the law of a country to authorize corporal punishment of a seaman by the master of a vessel, and the seaman commits murder in resisting an attempt to inflict it in a proper case, and, escaping to another country, is demanded under a treaty of extradition,—can the latter country refuse the surrender on the ground, that, while killing in resistance to lawful force is a crime in each country, the force attempted in the particular case was not lawful by the law of the latter country?—D.

Justice; and on the part of the Government of the United States, the surrender shall be made only by the authority of the Executive thereof.

'ART. 4. The expenses of any detention and delivery effected [189] in virtue of the preceding provisions, shall be borne and defrayed by the Government in whose name the requisition shall have been made.

'ART. 5. The provisions of the present convention shall not be applied in any manner to the crimes enumerated in the second article, committed anterior to the date thereof, nor to any crime or offence of a purely political character.'

§ 119. The following additional article to the above convention was concluded between the contracting parties at Washington on the 24th February, 1845, and subsequently ratified.

'The crime of robbery, defining the same to be the felonious and forcible taking from the person of another, of goods or money to any value, by violence, or putting him in fear; and the crime of burglary, defining the same to be, breaking and entering by night into a mansion house of another, with intent to commit felony; and the corresponding crimes included under the French law in the words *vol qualifié crime*, not being embraced in the second article of the convention of extradition concluded between the United States and⁽¹⁾ France, on the 9th of November, 1843, it is agreed by the present article, between the high contracting parties, that persons charged with those crimes shall be respectively delivered up, in conformity with the first article of the said convention; and the present article, when ratified by the parties, shall constitute a part of the said convention, and shall have the same force as if it had been originally inserted in the same.'⁷⁶

§ 120. In the negotiation of treaties stipulating for the extradition of persons accused or convicted of specified crimes, certain rules are generally followed, and especially by constitutional governments. The principal of these rules are, that a State should never authorize the extradition of its own citizens or subjects,⁷⁷ [190] or of persons accused

[⁷⁶ The supplemental convention between France and the United States of Feb. 10, 1858, extends the duty of extradition to principals, accessories, and accomplices in the following crimes: 'forging or knowingly passing or putting in circulation counterfeit coin or bank notes or other paper current as money, with intent to defraud any person or persons; embezzlement by any person or persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment.']—D.

[⁷⁷ *Extradition by a State of its own Subjects. Territoriality of Criminal Law.*—The obligation or willingness of a State to surrender its citizens who are charged with crimes committed abroad, and have sought refuge in their own country, is affected by the consideration whether such State punishes its citizens for crimes so committed. In that respect there is a marked difference among nations. Russia, Norway, most of the German States, some of the Swiss cantons, and Portugal, try their subjects for offences of almost all kinds committed abroad; and that not only against their own citizens, but against foreigners. In Great Britain, France, and the United States, the general principle is to regard crimes as of territorial jurisdiction. Trying their citizens in foreign countries for offences committed there, for which they have

[¹ For States and *read* States of America and.]—G.G.W.

or convicted of political or purely local crimes, or of slight offences, but should confine the provision to such acts as are, by common accord, regarded as grave crimes.^(a)⁷⁸

jurisdiction by treaty, as in China and many of the non-Christian States, does not invalidate the principle. These three nations take jurisdiction over the crime of slave-trading committed by their own citizens, without reference to the nationality of the vessel in which it may have been committed; but that is because they have attached to this offence, by treaty and by legislation, the character of piracy. France, however, does punish crimes committed by Frenchmen abroad against the safety of France, and the counterfeiting of her public seals and money, which may circulate anywhere. Belgium and Holland punish all offences of their subjects committed abroad against their own State or its subjects, and certain great crimes against foreigners committed abroad, without adopting the general rule. The Italian monarchy punishes high crimes of its subjects committed abroad, but treats misdemeanors by the rule of reciprocity.

The question whether a State shall punish a foreigner found within its limits for a crime previously committed abroad against that State or its subjects, also depends upon its system respecting punishing generally for crimes committed abroad. Great Britain and the United States, respecting strictly the principle of the territoriality of crime, leave them unpunished. France follows the analogy of its treatment of its own subjects under like circumstances. It seems to be a rule almost without exception, that a State will not try its own subjects for offences committed abroad against foreign States or their subjects, although some States of the more despotic character refuse asylum to political offenders. Mohl's *Staatsr. Völk. und Pol. i. 644 et seq.* Woolsey's *Introd. § 78.*—D.

(a) Ortolan, *Règles Internationales de la Mer*, tom. i. p. 340.

[⁷⁸ *Later Extradition Treaties.*—Since the author's text and notes to his own last edition, some new extradition treaties have been made. One between the United States and Prussia, negotiated by Mr. Wheaton himself in 1845, was rejected by the Senate of the United States, it is supposed on the ground that it exempted each party from the obligation to surrender its own subjects; but, in later cases, that objection seems to have been waived, as the treaty of June 16, 1852, between the United States and Prussia (U. S. Statutes, x. 1022⁽¹⁾), provides in Art. X⁽¹¹⁾ that 'none of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of the treaty.'⁽¹¹⁾ Nearly all the German States, either originally or by subsequent action, are parties to this treaty. The objections heretofore made to such a provision rested on two considerations,—the want of reciprocity, as the United States did not try its citizens for crimes committed abroad, while the other parties to the treaty did; and the difficulties that might arise, if Prussia and the German powers should claim to treat as subjects persons naturalized in the United States committing crimes here, and seeking asylum in their native country.

The same exception as to extradition of citizens or subjects is found in the treaties of the United States with Bavaria in 1853, with Hanover in 1855, with the Two Sicilies in 1856,^(iv) with Austria in 1856, with Baden in 1857, and with Sweden and Norway in 1860. The treaties with the Hawaiian Islands in 1849, with the Swiss Confederation in 1850, with Venezuela in 1861,^(v) and with Mexico in 1862,^(vi) do not contain the exception. In no treaty do the United States include political or military offences, or offences against peculiar local laws, or petty crimes or misdemeanors. The provision in Mr. Jay's treaty, respecting the *quantum* of evidence necessary to require extradition, is repeated in the subsequent treaties.

Great Britain has steadily refused to surrender political offenders, or to deny them asylum. Hansard's *Debates*, 1853, cxxiv. 805. Lord Palmerston's Despatch upon the demand of Austria and Russia on Turkey for the extradition of the Hungarian refugees. *Annual Register*, 1849, p. 342. Heffter, *europ. Völk.* § 63. Phillimore's *Intern. Law*, i. 407-432. The Emperors of Russia and Austria receded from this demand. Extradition of political offenders obtains between the States of the German Confederation.

The Emperor of the French, not disputing the right of England to give asylum to political offenders, represented that plots to assassinate him had been formed by refugees in England,

[¹ For 1022 read 964.]—G.G.W.

[¹¹ For the treaty read this Convention.]—G.G.W.

[^v For 1861 read 1860.]—G.G.W.

[¹¹ For X read III.]—G.G.W.

[^{iv} For 1856 read 1855.]—G.G.W.

[^{vi} For 1862 read 1861.]—G.G.W.

[191] The delivering up by one State of deserters from the military or naval service of another also depends entirely upon mutual comity, or upon special compact between different nations.^(b)⁷⁹

§ 121. A criminal sentence pronounced under the municipal law in one State can have no direct legal effect in another. If it is a sentence of conviction, it cannot be executed without the limits of the State in which it is pronounced, upon the person or property of the offender; and if he is convicted of an infamous crime, attended with civil disqualifications in his own country, such a sentence can have no legal effect in another independent State.^(a)

Extra-territorial operation of a criminal sentence.

But a valid sentence, whether of conviction or acquittal, pronounced in one State, may have certain indirect and collateral effects in other States. If pronounced under the municipal law in the State where the supposed crime was committed, or to which the supposed offender owed allegiance, the sentence, either of conviction or acquittal, would, of course, be an effectual bar (*exceptio rei judicatæ*) to a prosecution in any other State. If pronounced in any other foreign State than that where the offence is alleged to have been committed, or to which the party owed allegiance, the sentence would be a nullity, and of no avail to protect him against a prosecution in any other State having jurisdiction of the offence.⁸⁰

§ 122. The judicial power of every State extends to the punishment of certain offences against the law of nations, among which is piracy.

Piracy under the law of nations.

Piracy is defined by the text-writers to be the offence of depredating on the seas without being authorized by any sovereign

and asked that England should provide for the punishment of such offences. In accordance with this request, Lord Palmerston, being Prime Minister, introduced a bill into Parliament to punish conspiracies formed in England to commit murder beyond Her Majesty's dominions; but the bill was rejected. The controlling reason evidently was a feeling that the French Government had used too high a tone in demanding the passage of such a law.]—D.

(b) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 22. Note to Duponceau's Transl. p. 174.

[⁷⁹ The United States have made no treaties for the extradition of deserters from military or naval service. Negotiations for a treaty with Great Britain to include such deserters and fugitive slaves, while slavery existed in the British West-India Islands, were begun in 1826 by the United States, and renewed in 1828–29, but failed from the refusal of the British Government to surrender fugitive slaves. Correspondence between Mr. Clay and Mr. Gallatin, June 19, 1826, and Sept. 26, 1827; and Mr. Clay and Mr. Barbour, June 13, 1828, and Oct. 2, 1828. Br. and For. State-Papers, 1829–30, p. 1221. There is a convention between Russia and Prussia, Aug. 8, 1857, for the mutual surrender of deserters and persons owing future military service. Nouveau Recueil, xvi. 595.]—D.

(a) Martens, Précis, &c., liv. iii. ch. 3, § 86. Klüber, Droit des Gens Moderne de l'Europe, Part II. tit. 1, ch. 2, §§ 64, 65. Fœlix, Droit International Privé, § 565.

[⁸⁰ Halleck's Intern. Law, 175. Westlake's Pr. Intern. Law, ch. ii. Riquelme, Derecho Pub. Intern. ii. 2,⁽¹⁾ 3. Woolsey's Introd. § 77. If a criminal should fly to another State for the purpose of obtaining a milder sentence, such sentence would be no bar to a trial in the State in which the crime was committed. Halleck's Intern. Law, 175.]—D.

[¹ For ii. 2 read ii. cap. 2.]—G.G.W.

State, or with commissions from different sovereigns at war with each other.^(a)

The officers and crew of an armed vessel, commissioned against one nation, and depredating upon another, are not liable to be treated as pirates in thus exceeding their authority. The State by whom the commission is granted, being responsible to other nations for what is done by its commissioned cruisers, has the exclusive jurisdiction to try and punish all offences committed under color of its authority.^(b)⁸¹

§ 123. The offence of depredating under commissions from different sovereigns, at war with each other, is clearly piratical, since the authority conferred by one is repugnant to the other; but it has been doubted how far it may be lawful to cruise under commissions from different sovereigns allied against a common enemy. [193] The better opinion, however, seems to be, that although it might not amount to the crime of piracy, still it would be irregular and illegal, because the two co-belligerents may have adopted different rules of conduct respecting neutrals, or may be separately bound by engagements unknown to the party.^(a)⁸²

§ 124. Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals.^(a)⁸³

(a) See authorities cited in note to the case of *United States v. Smith*, Wheaton's Rep. v. 157. (b) *Bynkershoek*, Quæst. Jur. Pub. lib. i. cap. 17. *Rutherforth's Inst.* ii. 595.

[⁸¹ The author doubtless would confine this statement to acts done under color of national authority, but exceeding it. The mere fact of having a commission to cruise against a certain nation would not exempt the possessor from trial as a pirate, if the acts done by him to vessels of a different nation were such as could not, in any sense, be said to be done under color of belligerent authority.]—D.

(a) *Bynkershoek*, Quæst. Jur. Pub. lib. i. cap. 17, p. 130; *Duponceau's Transl. Valin, Commentaire sur l'Ord. de la Marine*, tom. ii. p. 236. 'The law,' says Sir L. Jenkins, 'distinguishes between a pirate who is a highwayman, and sets up for robbing, either having no commission at all or else hath two or three, and a lawful man-of-war that exceeds his commission.' Works, ⁽¹⁾ii. 714.

[⁸² *Hautefeuille* contends that a privateer taking commissions from two sovereigns, though they be allies in the war, is a pirate. *Droits des Nat. Neutr.* tom. i. liv. ⁽¹⁾3, p. 190. Such cruising is condemned by *Massé* (*Droit Comm.* liv. ii. tit. 1, No. 166) and by *Martens* (*Essai sur les Amateurs*, ch. 2, § 14), although they do not positively say that persons so cruising are pirates. *Aliier*, *Abreu*, *Presas Marit.* ⁽¹⁾ Part II. ch. 1, §§ 7, 8. The objection is, that the cruiser should be responsible to one sovereign whose instructions and rules of war he must obey exclusively, and who shall be responsible for him. *Phillimore* treats such acts as dangerous and to be discountenanced, but not as necessarily piracy. i. 374. ^(1v)—D.

(a) 'Every man, by the usage of our European nations, is *justiciable* in the place where the crime is committed; so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they may be ^(v) taken.' Sir L. Jenkins's Works, ⁽¹⁾ii. 714.

[⁸³ *Piracy*.—It must be admitted, that the attempted definitions of piracy are unsatisfactory; some being too wide, and some too narrow. The author's description, rather than

[¹ For Works read Life.]—G.G.W.

[¹¹ For *Presas Marit.* read *Presas de Mar.*]—G.G.W.

[^{1v} For 374 read 394.]—G.G.W.

[¹¹ For liv. read titre.]—G.G.W.

[^v For may be read are.]—G.G.W.

[194] This proposition, however, must be confined to piracy as defined by the law of nations, and cannot be extended to offences which

Distinction between the law of nations and piracy under the municipal statutes.

definition, is perhaps the most adequate. Some writers, and even judges, seem to have treated the phrase *hostis humani generis* as if it were a definition of piracy. Dr. Tindal, Howell's State Trials, xii. 1271-2, note, in the case of the privateers of James II., reports this point as made and overruled; and says, 'It is neither a definition nor as much as a description of a pirate, but a rhetorical invective.'^[1] It is true, that a pirate *jure gentium* can be seized and tried by any nation, irrespective of his national character, or of that of the vessel on board which, against which, or from which, the act was done. The reason of this must be, that the act is one over which all nations have equal jurisdiction. This can result only from the fact, that it is committed where all have a common, and no nation an exclusive, jurisdiction,—i.e., upon the high seas; and, if on board ship, and by her own crew, then the ship must be one in which no national authority reigns. The criminal may have committed but one crime, and intended but one, and that against a vessel of a particular nation; yet, if done on the high seas, under certain circumstances hereafter to be referred to, he may be seized and tried by any nation. In such case, it cannot be necessary to [194] satisfy the court affirmatively, as a fact, that he had a purpose to plunder vessels of all nations, or vessels irrespective of nationality; nor would the court be driven to an artificial presumption of law, contrary to the facts in the case, that such general hostile purpose existed.

On the other hand, that is too wide a definition which would embrace all acts of plunder and violence, in degree sufficient to constitute piracy, simply because done on the high seas. As every crime may be committed at sea, piracy might thus be extended to the whole criminal code. If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time and continuing under lawful authority, and the offender were secured and confined by the master of the vessel, to be taken home for trial,—this state of things would not authorize seizure and trial by any nation that chose to interfere, or within whose limits the offender might afterwards be found. *United States v. Palmer*, Wheaton's Rep. iii. 610. *United States v. Pirates*, Ib. v. 184. *United States v. Klintonck*, Ib. v. 144. *United States v. Holmes*, Ib. v. 412. *The Malek Adhel* (*Harmony v. United States*), Howard, ii. 210. *United States Laws*, ix. 175; xii. 314-15. *Rutherford's*^[11] *Inst. lib. ii. ch. 9*. *American State Papers*, i. 88-94, Mr. Jefferson to M. Genêt.

To constitute piracy *jure gentium* it is necessary, 1st, That the offence, being adequate in degree,—for instance, robbery, destruction by fire, or other injury to persons or property,—must be committed on the high seas, and not within the territorial jurisdiction of any nation; and, 2d, That the offenders, at the time of the commission of the act, should be in fact free from lawful authority, or should have made themselves so by their deed, or, as Sir L. Jenkins says (ii. 714), 'out of the protection of all laws and privileges,' or, in the words of the Duc de Broglie (*Ecrits*, i. 365), 'qui n'ait ni feu ni lieu' in short, they must be in the predicament of outlaws.

It has sometimes been said, that the act must be done *lucri causâ*, and the English common-law definition of *animus furandi* has been treated as a requisite; but the motive may be gratuitous malice, or the purpose may be to destroy, in private revenge for real or supposed injuries done by persons, or classes of persons, or by a particular national authority.

On these points the following authorities may be consulted: As to the definition, *hostis humani generis*, Howell's State Trials, xii. 1271-2, note; Tindal's Law of [195] Nations, cited there. Phillimore's Intern. Law, i. 406. Le duc de Broglie, 'Sur la Piraterie,' *Ecrits*, iii.^[111] 335-375. The Serhassan, Wm. Rob. ii. 357. Notes of Cases, iii. 592. *The Malek Adhel*, Howard, ii. 232. As to other elements necessary to give general jurisdiction, and constitute piracy *jure gentium*, Woolsey's Introd. § 137. Phillimore's Intern. Law, i. 394. Bynkersh. Quæst. Jur. Pub. lib. i, cap. 17. Kent, i. 184-6. Le duc de Broglie, 'Sur la Piraterie,' *Ecrits*, iii.^[111] 335-375. Wildman's Intern. Law, ii. 150. *United States v. Palmer*, Wheaton's Rep. iii. 610. *United States v. Klintonck*, Wheaton's Rep. v. 152. *United States v. Pirates*, Ib. 185. *United States v. Holmes*, Ib. 412. Blackst. Comm. iv. 286.

The following suggestions are offered as to the elements of piracy *jure gentium*:—

I. It is not necessary that a purpose to depredate on property, beyond such as belongs

[1] The quotation reads: 'Hostis humani generis is neither a definition, or as much as a description of a pirate, but a rhetorical invective to shew the odiousness of that crime.'—G.G.W.

[11] For Rutherford's read Rutherford's.]—G.G.W.

[111] For iii. read i.]—G.G.W.

are made piracy by municipal legislation. Piracy, under the law of nations, may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed; but piracy created by municipal statute can only be tried by that State within whose territorial jurisdiction, and on board of whose vessels, the offence thus created was committed. There are certain acts which are considered piracy by the internal laws of a State, to which the law of nations does not attach the same signification. It is not by force of the international law that those who commit these acts are tried and punished, but in consequence of special [195] laws which assimilate them to pirates, and which can only be applied by the State which has enacted them, and then with reference to its own subjects, and in places within its own jurisdiction. The crimes of murder and robbery, committed by foreigners on board of a foreign vessel, on the high seas, are not justiciable in the tribunals of another country than that to which the vessel belongs; but if committed on board of a vessel not at the time belonging, in fact as well as right, to any foreign power or its subjects, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no flag whatsoever, these crimes may [196] be punished as piracy under the law of nations, in the courts of any nation having custody of the offenders. (b)⁸⁴

to one nation or one class of persons or one individual, should be proved or artificially presumed.

II. The motive need not be *lucri causâ*; nor need the acts and intent square themselves to the English common-law definitions of *animus furandi*, or malice. It is enough if the *corpus delicti* exists; and the *animus* be one which the law of nations regards as criminal, and hostile to the rights of persons and property on the high seas,—κατὰ τὸν κοινὸν ἀπάντων ἀνθρώπων νόμον.

III. Although the act and intent may be sufficient to constitute piracy, all nations have not jurisdiction to try it, unless it was committed beyond the exclusive jurisdiction of any nation. To put it in such predicament, the act must have been committed not only on the high seas, but beyond that kind of jurisdiction which all nations concede to each nation over vessels sailing the seas under at once its *de facto* and *de jure* authority and responsibility, and in the peace of all nations. Crimes, therefore, of whatever character, committed on board by inmates of such vessels, are not justiciable of all nations. But, if such a vessel passes into the control of the robbers or murderers on board, and the lawful authority is in fact displaced, and she becomes an outlaw, any nation may seize the vessel and try the criminals. So, if persons on board any kind of sea-craft, not in fact under any national authority and responsibility, and acting in defiance thereof, board a duly authorized vessel sailing in the peace of all nations, and commit robbery or murder on board, and depart, leaving the vessel to its regular authorities, they may still be tried as pirates by any nation in whose jurisdiction they may be found; although the cruisers of a foreign nation, by reason of the rule against international interference, could not have taken them out of such a vessel, if, after their acts were completed, they had been secured by the authorities of the vessel and confined in her, to be taken to port for trial.]—D.

(b) United States v. Klintonck, Wheaton's Rep. v. 144; United States v. Pirates, Ib. 184.

[⁸⁴ *Rebels as Pirates*.—The question may as well be considered here as elsewhere, to which prominence has lately been given by the civil war in the United States, in what sense rebels in arms, cruising on the high seas against the property of the parent State, are pirates.

The question must first be considered as between the rebels and the parent State. The parent State must hold the legal *status* of rebellion to be crime, and that of rebels to be criminals. The dimensions of the rebellion, its power and organization, do not alter the strictly legal

[197] § 125. The African slave-trade, though prohibited by the municipal laws of most nations, and declared to be piracy by the

Slave-trade, whether prohibited by the law of nations.

status of the rebel. Policy or humanity may lead the State to forego or remit the enforcement of the law, and to treat rebels as belligerents, for certain purposes; but this is in the constant control of the political department of the government, from day to day, and in each case and locality. (See *ante*, note 32, on p. 84.) As a question of law, in the courts, a rebel is a criminal, whether his acts are done at sea or on land. His acts of violence are treason, and may be robbery or murder. If rebels in control of a vessel at sea plunder and destroy property, and have no defence except the authority of the rebellious organization, a court of the parent State cannot recognize that authority. The question of acting *bonâ fide* under color of an asserted belligerent power in the rebels, cannot arise between the State and one of its own subjects. The only result would seem to be, that, in a court of law, the rebel is a criminal. *Rose v. Himely*, Cr. iv. 272. *Cheriot v. Foussat*, Bing.^[1] iii. 253. Nelson J., in the trial of the Savannah pirates, 371-3. Grier J., in the trial of Smith, 96-99. Judge Sprague's charge to the Grand Jury, Sprague's Decisions, ii. and Law Rep. xxiv. 17, 18. Judge Sprague's opinion in the *Amy Warwick*, Sprague's Decisions, ii. and *Ib.* 344.

Is his crime piracy? Whether piracy by the municipal law, is a mere question of special statutes, not of international law. The State can so denominate the crime if it chooses. Can the courts of the parent State pronounce the act piracy *jure gentium*? In the case of King James II.'s pirates (Howell's State Trials, xii.) men cruising against British commerce under a commission from James II., who claimed to be *de jure* king, were adjudged pirates *jure gentium*. Dr. Phillimore (Intern. Law. i. 406) says, 'The reason of the theory must be allowed to preponderate greatly towards the position that these privateers were *jure gentium* pirates.'^[2]

The proclamation of the President of the United States of 19 April, 1861, declares that 'any person acting under pretended authority of the States in rebellion and molesting vessels of the United States, would be held amenable to the laws of the Union for the prevention and punishment of piracy.'^[3] United States Laws, xii., App. for 1861, p. 2.^[4] This does not necessarily imply piracy *jure gentium*, as there were statutes in existence declaring acts to be piracy which would not or might not be so *jure gentium*. The crew of The Savannah, commissioned under rebel authority, were indicted for piracy, and tried at New York before Judge Nelson. He ruled that their offence, if proved, was piracy under the counts founded upon the statutes, but expressed a doubt whether it would be piracy *jure gentium*. The reason, however, which he assigned for the doubt, is inadequate; viz., that the prisoners' intention to depredate was confined to vessels and cargoes of one nation only; while, to constitute such piracy, a general intent to depredate on vessels of any or all nations was essential. This distinction is not maintainable in principle or on authority. (See note 83, *supra*, on Piracy.) The real difficulty is in the actual intent of the individuals, which is not to depredate [197] in a criminal sense, but to capture and destroy *jure belli*. An answer to this objection is, that a subject of the State cannot be allowed, in a court of his own State, to plead any such intent under such circumstances. It is inconsistent with the political right which the State has of treating rebellion as a crime. In the trial of Smith in Philadelphia, who was acting under a rebel commission, Judge Grier held that the court could treat him only as a pirate and robber. (Smith's Trial, 1861.) Smith and his associates were convicted; but the President, from motives of policy, and because the rebels threatened retaliation, transferred them to military custody as prisoners of war: and no cases afterwards occurred of an attempt by the government to treat rebels in arms as criminals. But this course of policy does not affect the legal question, in the abstract, before a court; as the sovereign, in suppressing a rebellion, may exercise as well sovereign as belligerent powers against rebels. (Prize Causes,^[5] Black, ii. 635. *Amy Warwick*, Sprague's Decisions, ii. and Law Rep. xxiv. 344. *Rose v. Himely*, Cr. iv. 272.) In the debate in the House of Lords, on the 16th May, 1861, on the President's proclamation, it was conceded by Lords Brougham,

[¹ For Bing. read Binn.]—G.G.W.

[² This quotation should read: 'The reason of the thing must be allowed to preponderate greatly towards the position of Tindal, that these privateers were *jure gentium* pirates.'—G.G.W.]

[³ This quotation should read: 'any person, under the pretended authority of the said States, or under any other pretence, shall molest a vessel of the United States, or the persons or cargo on board of her, such person will be held amenable to the laws of the United States for the prevention and punishment of piracy.'—G.G.W.]

[⁴ For 2 read 1259.]—G.G.W.

[⁵ For Causes read Cases.]—G.G.W.

statutes of Great Britain and the United States, and, since the treaty of 1841, with Great Britain, [198] by Austria, Prussia, and Russia, is not

Kingsdown, Chelmsford, Derby, and the Lord Chancellor, that it was competent for the United States to treat their own citizens, cruising under Confederate authority, as pirates; but whether *jure gentium* or under statute law was not distinctly noticed.

If it is conceded that a rebel, indicted in the courts of the parent State for piracy under the law of nations, cannot be allowed to set up that his intent was to depredate only *jure belli*, the logical result would seem to be that such courts may declare him a pirate *jure gentium*, unless, to constitute such piracy, an actual intent to depredate irrespective of the national character of vessels is an essential element in the crime. That such an intent is not necessary, *vide supra*, note 83, on Piracy.

The next question is, how such persons will be regarded in the courts of a neutral country. Lord Chelmsford said, in the debate above referred to: 'If the Southern Confederacy had not been recognized as a belligerent power [*i.e.* by the British Government], if any Englishman were to fit out a privateer for the purpose of assisting the Southern States against the Northern States [*i.e.* the United States], he would be guilty of piracy.' The reasoning would seem to be, that the same rules govern the courts of the neutral nations as govern those of the parent State. If the acts are sufficient to constitute piracy, unless the authority is a defence, the court of the neutral country must follow the lead of the political department of its government, as recognition of belligerency is a political, and not a judicial, question. Accordingly, if the neutral government has declined to recognize the parties to a rebellion as belligerents, its courts cannot allow their commission to be a defence, or treat acts done under it as belligerent acts. The courts of the parent State and of the neutral power both follow the lead of the political department. But the further question arises, whether, rejecting the authority of the commission and the lawful belligerency of the acts, the court may not still open the question of the actual intent of the prisoner. In *United States v. Klinton*, Wheaton's Rep. v. 149, Marshall C. J. threw out a suggestion whether a person, acting in good faith under a commission purporting to be issued by competent foreign authority, might not be clear of the crime of piracy. No State can admit that defence by its own citizens engaged in a contest against itself. Perhaps a court of law cannot do so in a case of one of its own citizens acting under a commission from any foreign power not recognized as belligerent by his sovereign. A [198] writer in the *Am. Jurist*, vol. x. 267-8, contends that 'whoever takes a commission to wage private war from any other than his own sovereign, does it at his own peril, and must know that the commission he receives is lawful.'¹ Any other position appears inconsistent with the safety of mankind.'

The course pursued by the British Government during the war of the American Revolution seems to have been this: An Act of Parliament was passed (17 Geo. III. ch. 9, 1777), reciting that acts of treason, piracy, and felony had been committed by sundry persons, many of whom were, and would thereafter be, confined for trial on charges of such crimes, and that it might be inconvenient to try them forthwith, and of evil example to let them go at large, and authorizing the detention of such persons by the crown, with bail or judicial intervention, for one year. This act was renewed annually until the end of the war. Its object was to obtain a parliamentary declaration that the legal *status* of American rebels was that of felons or pirates, and to secure a mode of detaining them in custody without recognizing them as prisoners of war, or being obliged to bring them to trial as criminals. In the mean time, between the armies in America, prisoners were treated as prisoners of war, exchanged, paroled, &c.; and it is believed that no persons were judicially tried and punished as criminals during the war: and the recognition of independence disposed of the question.

The next question is, how foreigners who aid the rebellion by cruising against commerce will be regarded by the courts of the parent country. It would seem that the court can make no distinction in their favor. The rebellion is a crime; and all who voluntarily aid it in arms are criminals, whether subjects or intervening foreigners. The fact that the sovereign, whose subjects those foreigners are, may have recognized the rebellion as belligerent, can have no legal effect on their *status* in the court of the State engaged in subduing the rebellion. It is a fact addressing itself solely to the political department of the government. In the debate in

[¹ After lawful a clause is omitted.]—G. G. W.

such by the general international law; and its interdiction cannot be enforced by the exercise of the ordinary right of visitation and search.

the House of Lords, on the 16th May, 1861, upon the President's proclamation, strong expressions were used by Lords Kingsdown and Cranworth and the Lord Chancellor (Westbury), to the effect that the United States ought not to claim the rights of a belligerent as against foreign commerce,—viz., search and blockade, and yet treat the rebels as traitors, and British subjects, cruising under rebel commissions, as criminals; and that, as Britain had acknowledged the rebels as capable of commissioning cruisers, she had a right to demand that their commissions should be respected by the United States in case of British subjects. These were, however, considerations addressed to statesmen and not to courts. And, at the same time, it seemed to be conceded by all the law lords, that, under the terms of the Queen's proclamation of May 13, 1861, recognizing belligerency, no British subject, making himself a party to the war against the United States, with which Great Britain was at peace, could expect the intervention of the crown in his favor.

The terms of the Queen's proclamation bearing on this point are these: It declares Great Britain to be at peace with the United States,—recognizing the persons in rebellion as belligerents, and both 'the contending parties' as having the rights of belligerents against neutrals; declares strict neutrality and non-intervention; and commands [199] all British subjects to observe strict neutrality, and 'to abstain from violating or contravening either the law and statutes of the realm in that^[1] behalf, or the law of nations in relation thereto, as they will answer to the country^[11] at their peril.' It calls attention to the neutrality or foreign-enlistment act of 59 George III.; and declares that British subjects, offending against that statute or the law of nations respecting war, will be liable to the penalties of the statute and the law of nations; and ends with the declaration, that British subjects 'who may misconduct themselves in the premises . . .^[11] will do so at their peril and of their own wrong,'^[1v] and that ^[1v]'they will in no wise obtain any protection from us against any liabilities or penal consequences, but will, on the contrary, incur our high displeasure by such misconduct.'

No case occurred, in this war, of a British subject, engaged in acts which Great Britain declares and considers belligerent when done by the parties to the war, being treated by the United States as a pirate, or otherwise as a criminal; the government giving all foreigners found in arms under rebel authority the same treatment they gave to citizens in arms,—that of prisoners of war.

The proclamation of the Emperor of the French, of June, 1861, and of the Queen of Spain, of 17 June, 1861, are substantially to the same effect; and both warn their subjects, that, if they make themselves parties to the war, they shall have no claim to any protection from their government against any acts or measures, whatever they may be, which the belligerents may exercise or decree.

A question cognate to the present was presented in the case arising out of the burning of the American merchant-ship *Golden Rocket*. This vessel was seized at sea and burned in July, 1861, by the steamer *Florida*, commanded by one Semmes, who held a commission as an officer in the navy of the rebel government. Actions were brought on the policies of insurance in the Supreme Courts of Maine and Massachusetts, and in the Circuit Court of the United States for Massachusetts. Among the questions of law argued was this: Whether the owners could recover for a loss under policies which did not insure against belligerent capture, but did insure against pirates and assailing thieves. The Supreme Court of Massachusetts, by a unanimous opinion, that of Maine by an opinion of a majority of the court, and Mr. Justice Clifford in the Circuit Court of the United States, decided, that, this being a mere civil private contract, the question was, what the parties meant by the words they used: and, although the legal *status* of the citizens of the United States who committed this act, in the view of the law of the Union, in any criminal proceeding against them, would be that of traitors, criminals, and, at least under the statute law, of pirates, the contract between underwriters and merchants looked, not to the code or policy of any one nation in its use of the term 'pirate' as distinguished from a belligerent, but referred to general commercial usages of speech, and to such a state of things, as constituted piracy by the general, public, commercial law of the world: and that, as the rebellion had risen to the dimensions of an actual war waged by a *de facto* government,

[¹ For that read this.]—G.G.W.

[¹¹ Omit . . .]—G.G.W.

[¹¹ For country read contrary.]—G.G.W.

[^{1v} Omit quotation marks after wrong and before they.]—G.G.W.

That right does not exist, in time of peace, independently of special compact.(a)

[199] The African slave-trade, once considered not only a lawful but desirable branch of commerce, a participation in which was made the object of wars, negotiations, and treaties between different European States, is now denounced as an odious crime, by the almost universal consent of nations. This branch of commerce was, in the first instance, successively prohibited by the municipal [200] laws of Denmark, the United States, and Great Britain, to their own subjects. Its final abolition was stipulated by the treaties of Paris, Kiel, and Ghent, in 1814, confirmed by the declaration of the Congress of Vienna, of the 8th of February, 1815, and reiterated by the additional article annexed

which the chief commercial nations of the world recognized as belligerent, and in which war the United States had exercised powers and privileges accorded by neutrals only to a state of war, the act of destroying The Golden Rocket was not piracy *in the sense of the* [200] *policy*. See The Golden Rocket Cases—viz., *Dole v. The N. Eng. M. M. Ins. Co.* Allen, vi. 392; *Dole v. Merch. M. M. Ins. Co.*; and *Dole v. N. Eng. M. M. Ins. Co.*, in the United States Circuit Court for Massachusetts, October, 1864.

The following propositions are offered, not as statements of settled law (for most of them are not covered by a settled usage of nations, by judicial decisions of present authority, or by the agreement of jurists), but as suggestions of principles:—

I. The courts of a State must treat rebellion against the State as a crime, and the persons engaged in it as criminals. If the acts are depredations on commerce protected by the State, they may be adjudged piracy *jure gentium* by the courts of the State. It is a political and not a legal question, whether the right so to treat them shall be exercised.

II. The fact that the State has actually treated its prisoners as prisoners of war, exchanged prisoners, respected flags of truce, &c., or has claimed and exercised the powers and privileges of war as against neutrals, does not change the abstract rule of law, in the Court. If the State presents such persons to the court for trial, the court must adjudge them criminals. The question whether they shall be so presented is one, not of law, but of policy, which the political department of the State must hold in its hands, and which may be varied from time to time, according to circumstances.

III. If a foreigner knowingly cruises against the commerce of a State under a rebel commission, he takes the chance of being treated as a pirate *jure gentium*, or a belligerent. In point of law, his foreign allegiance or citizenship is immaterial. In this respect, it is immaterial whether the sovereign whose subject he is has recognized the rebel authorities as belligerents or not. It is not the custom for foreign nations to interfere to protect their citizens voluntarily aiding a rebellion against a friendly State, if that State makes no discriminations against them.

IV. If a foreigner cruises under a rebel commission, he takes the chance of being treated as a pirate or a belligerent by his own nation and all other nations, as well as by that he is cruising against. If his own nation does not recognize the belligerency of the rebels, he is, by the law of his own country, a pirate. If it does, he is not. In this respect, each nation acts independently of others and for itself; and the courts of each nation are governed by the consideration whether their own political authorities have, or have not, recognized the belligerency.

V. Where a rebellion has attained such dimensions and organization as to be a State *de facto*, and its acts reach the dimensions of war *de facto*, and the parent State is obliged to exercise powers of war to suppress it, and especially if against neutral interests, it is now the custom for the State to yield to the rebellion such belligerent privileges as policy and humanity require; and to treat captives as prisoners of war, make exchanges, respect flags of truce, &c. Yet this is a matter of internal State policy only, changeable at any time. See note 32, *ante*, The United States a Supreme Government.]—D.

(a) Dodson's Adm. Rep. ii. 210, *Le Louis*. Wheaton's Rep. x. 66,⁽¹⁾ *La Jeune Eugenie*.

[¹ 10 Wheaton 66 is report of *The Antelope*. For *La Jeune Eugenie*, see 2 Mason 409.]—G.G.W.

to the treaty of peace concluded at Paris, on the 20th November, 1815. The accession of Spain and Portugal to the principle of the abolition was finally obtained, by the treaties between Great Britain and those powers, [201] of the 23d September, 1817, and the 22d January, 1815. And by a convention concluded with Brazil, in 1826, it was made piratical for the subjects of that country to be engaged in the trade after the year 1830.

§ 126. By the treaties of the 30th November, 1831, and 22d May,⁽¹⁾ 1833, between France and Great Britain, to which nearly all the maritime powers of Europe have subsequently acceded, the mutual right of search was conceded, within certain geographical limits, as a means of suppressing the slave-trade. The provisions of these treaties were extended to a wider range by the Quintuple Treaty, concluded on the 20th December, 1841, between the five great European powers, and subsequently ratified between them, except by France, which power still remained only bound by her treaties of 1831 and 1833 with Great Britain. By the treaty concluded at Washington, the 9th August, 1842, between the United States and Great Britain, referring to the 10th article of the treaty of Ghent, by which it had been agreed that both the contracting parties should use their best endeavors to promote the entire abolition of the traffic in slaves, it was provided, article 8, that 'The parties mutually stipulate that each shall prepare, equip, and maintain in service on the coast of Africa, a sufficient and adequate squadron, or naval force of vessels, of suitable numbers and descriptions, to carry in all not less than eighty guns, to enforce, separately and respectively, the laws, rights, and obligations, of each of the two countries, for the suppression of the slave-trade; the said squadrons to be independent of each other; but the two Governments stipulating, nevertheless, to give such orders to the officers commanding their respective forces as shall enable them most effectually to act in concert and co-operation, upon mutual consultation, as exigencies may arise, for the attainment of the true object of this article; copies of all such orders to be communicated by each Government to the other, respectively.' By the treaty of the 29th May, 1845, between France and Great Britain, new stipulations were entered into between the two powers, by which a joint co-operation of their naval forces on the coast of Africa, for the suppression of the slave-trade, was substituted for the mutual right of search, provided by the previous treaties of 1831 and 1833.⁸⁵

[⁸⁵ *The Slave Trade as Piracy*.—As Mr. Wheaton's text and notes leave the subject, it stands thus: The slave trade was prohibited to their own subjects by the United [202] States, Great Britain, France, Russia, Prussia, Austria, Spain, Portugal, Brazil, Denmark, and other powers. By the treaty of 1841, between Great Britain, Russia, Austria, and Prussia, the trade is declared piracy, and a mutual right of search is granted. Between Great Britain and France, and Great Britain and the United States, no mutual right of search was conceded;

[¹ *For May read March.*]—G.G.W.

Decisions
of British
and Ameri-
can courts
of justice.

[202] § 127. This general concert of nations to extinguish the traffic has given rise to the opinion, that though once tolerated, and

but, instead of that, were stipulations for maintaining naval cruisers, and for certain modes of naval co-operation. The history of the question, before as well as since, can be given to advantage in more detail.

By the treaty of Paris, of 1814, the eight powers engaged to exert themselves to suppress 'the sin of the slave trade;' and, by a separate article, Great Britain and France agreed to co-operate in obtaining the assent of all the civilized powers to a treaty declaring the abolition of the slave trade. Afterwards, in 1815, Great Britain proposed to France to agree to a mutual right of search within certain latitudes. The French Government declined the proposition, on the ground that the concession of the right of search was unpopular and hazardous. (Lord Castlereagh to the Duke of Wellington, and correspondence of Wellington and Talleyrand, October and November, 1815.) Great Britain made the same proposal, the same year, to Portugal, with like ill success. The declaration of 8 February, 1815, between the parties to the Congress of Vienna, was to the effect that they considered the slave-trade as 'repugnant to the principles of humanity and of universal morality;' and the eight powers bound themselves to take measures to secure its abolition. Between Great Britain, Sweden, the Netherlands, and Portugal, there are stipulations for a right of search, either general or within certain latitudes, and for trials by a mixed commission. At the Congress of Verona, in 1822, France refused to consent to a right of search, or to declaring the trade piracy *jure gentium*. Wheaton's Hist. of Law of Nations, 614-689. Between Great Britain and Spain, the treaty of 1835 conceded a right of search, and established mixed tribunals.

Between Great Britain and the United States, while there were declarations of a purpose and desire to suppress the trade, the United States refused to concede any right of search. (Correspondence between Messrs. Adams, Gallatin, and Rush: Am. State Papers, v.) In 1820, the United States, by Act of Congress, declared the slave-trade piracy; and, soon afterwards, Great Britain did the same by Act of Parliament. In 1824, a convention was signed which conceded a right of search within certain latitudes; but by advice of President Monroe, it was rejected, for that reason, by the Senate. Both the President and Mr. Adams doubted the power of the government, under our Constitution, to subject American citizens to trial by mixed tribunals; and, in lieu of such tribunals, the proposed convention provided that offenders should be sent to their respective countries for trial.

The celebrated Quintuple Treaty of 1841 conceded the right of search between the five great powers; but France declined to ratify it. It is understood that the ministers of the United States in Europe, especially Mr. Wheaton in Prussia and Mr. Cass in Paris, were influential in obtaining this refusal by France; but between the [203] other powers—Great Britain, Russia, Prussia, and Austria—the treaty subsisted. In 1845, between Great Britain and France, stipulations for naval co-operation were substituted for the proposed mutual right of search. Treaties of 1831, 1833, and 1845.

In 1850,⁽¹⁾ Great Britain stood a party to twenty-four treaties for the suppression of the slave trade. Of these, ten gave a right of search and of mixed courts; twelve gave the right of search, with trial only before home tribunals; two (with United States and France) gave neither right of search nor mixed tribunals, but provided for naval co-operation. Phillimore's Intern. Law, i. 332-3.

By the treaty of Washington of 1842 (commonly called the Ashburton Treaty), a provision was made for naval co-operation; the United States declining to agree to a right of search, however limited, or to mixed tribunals. But the subject is now practically settled between the two nations by the treaty of 7 April, 1862, negotiated by Mr. Seward and Lord Lyons.

The chief provisions of this treaty are as follows: The right to detain, search, seize, and send in for adjudication, is confined to cruisers of either power, expressly authorized for that purpose; and is to be exercised only over merchant-vessels, and only within a distance of two hundred and twenty miles from the coast of Africa, and to the southward of thirty-two degrees north latitude, and within thirty leagues from the island of Cuba, and never within the territorial waters of either contracting power. The right to visit is to be exercised where there is 'reasonable ground' to suspect a vessel of having been fitted out for, or engaged in,

[¹ For 1850 read 1849-1850.]-G.G.W.

even protected and encouraged, by the laws of every maritime country, it ought henceforth to be considered as interdicted by the international code of Europe and America. This opinion first received judicial countenance from the judgment of the Lords of Appeal in Prize Causes, pronounced [203] in the case of an American vessel, *The Amedie*, in 1807,⁽¹⁾ the trade having been previously abolished by the municipal laws of the United States and of Great Britain.

§ 128. The judgment of the court was delivered by Sir William Grant, in the following terms: *The Amedie.*

"This ship must be considered as being employed at the time of capture in carrying slaves from the coast of Africa to a Spanish colony. We think that this was evidently the original plan and [204] purpose of the voyage, notwithstanding the pretence set up to veil the true intention. The claimant, however, who is an *American*, complains of the capture, and demands from us the restitution of property of which, he alleges that he has been unjustly dispossessed. In all the former cases of this kind, which have come before this Court, the Slave Trade was liable to considerations very different from those which belong to it now. It had at that time been prohibited (so⁽ⁱⁱ⁾ far as respected carrying slaves to the colonies of foreign nations) by *America*, but by our own laws it was still allowed. It appeared to us, therefore, difficult to consider the prohibitory law of *America* in any other light than as one of those municipal regulations of a foreign State of which this Court could not take any cognizance. But by the alteration which has since taken place, the question stands on different grounds, and is open to the application of very different principles. The Slave Trade has since been totally abolished by this country, and our legislature has pronounced it to be contrary to the principles of justice and humanity. Whatever we might think as individuals before, we could not, sitting as Judges in a *British* Court of Justice, regard the trade in that light while our own the trade. The only slave trade referred to is the 'slave trade upon the coast of Africa,' or the 'African slave trade.'

To secure responsibility and freedom from vexation, special provisions are made as to exhibiting written authority, with names of the cruiser and her commander; entries on log-books, requiring the boarding-officers and commanders of authorized cruisers to be of a certain rank in the navy; providing exchange of notifications between the two powers of the names of vessels and commanders employed, and as to the course to be pursued in case of convoy, &c.; and stipulations that each power will make indemnification for losses to vessels arbitrarily and illegally detained. As to what shall constitute reasonable suspicion, certain articles or arrangements found on board are specified as authorizing a bringing in for adjudication, and as affording protection against claims for damages, and as *prima facie* evidence of being in the trade, and as authorizing condemnation of the vessel, unless clear and incontrovertible evidence is adduced that they were engaged in legal business. Mixed tribunals are constituted for adjudication upon the vessels, but persons are to be sent home to their respective jurisdictions to be tried. Vessels condemned by the tribunals are to be broken up, unless either government takes them for its navy, at an appraisement; and the negroes found on board are to be delivered to the State whose cruiser made the capture, and to be by that State set free. U. S. Laws, xii. 279.]—D.

[1 For 1807 read 1810.]—G.G.W.

[11 For so read as.]—G.G.W.

laws permitted it. But we can now assert that this trade cannot, abstractedly speaking, have a legitimate existence.

‘When I say abstractedly speaking, I mean that this country has no right to control any foreign legislature that may think fit to dissent from this doctrine, and to permit to its own subjects the prosecution of this trade; but we have now a right to affirm that *primâ facie* the trade is illegal, and thus to throw on claimants the burden⁽ⁱ⁾ of proof that, in respect of them, by the authority of their own laws, it is otherwise. As the case now stands, we think we are entitled to say, that a claimant can have no right, upon principles of universal law, to claim the restitution, in a Prize Court, of human beings carried as slaves.⁽ⁱⁱ⁾ He must show⁽ⁱⁱⁱ⁾ some right that has been violated by the capture, some property of which he has been dispossessed, to^(iv) which he ought to be restored. In this case the laws of the claimant’s country allow of no property^(v) such as he claims. There can, therefore, be no right to restitution. The consequence is, that the judgment must be affirmed.’^(a)^(vi)

The Fortuna.

[205] § 129. In the case of *The Fortuna*, determined in 1811, in the High Court of Admiralty, Lord Stowell, in delivering the judgment of the court, stated that an American ship, *quasi* American, was entitled, upon proof, to immediate restitution; but she might forfeit, as other neutral ships might, that title, by various acts of misconduct, by violations of belligerent rights most clearly and universally recognized. But though the Prize Court looked primarily to violations of belligerent rights as grounds of confiscation in vessels not actually belonging to the enemy, it had extended itself a good deal beyond considerations of that description only. It had been established by recent decisions of the Supreme Court, that the Court of Prize, though properly a court purely of the law of nations, has a right to notice the municipal law of this country *in the case of a British vessel* which, in the course of a prize-proceeding, appears to have been trading in violation of that law, and to reject a claim for her on that account. That principle had been incorporated into the prize-law of this country within the last twenty years, and seemed now fully incorporated. A late decision in the case of *The Amedie* seemed to have gone the length of establishing a principle, that any trade contrary to the general law of nations, although not tending to, or accompanied with, any infraction of the law of that country whose tribunals were called upon to consider it, might subject the vessels employed in that trade to confiscation. The *Amedie* was an American ship, employed in carrying on the slave-trade; a trade which

(a) Acton’s Admiralty Reports, i. 240.

[ⁱ For burden read burthen.]—G.G.W.

[ⁱⁱ For as slaves read as his slaves.]—G.G.W.

[ⁱⁱⁱ For show read shew.]—G.G.W.

[^{iv} For dispossessed, to read dispossessed, and to.]—G.G.W.

[^v For no property read no right of property.]—G.G.W.

[^{vi} The above text is quoted as a footnote to the case of *The Fortuna* found in 1 Dodson, 84. The original report of the case considerably different in wording is in 1 Acton, 240.]—G.G.W.

this country, *since its own abandonment of it*, had deemed repugnant to the law of nations, to justice, and humanity; though without presuming so to consider and treat it where it occurs in the practice of the subjects of a State which continued to tolerate and protect it by its own municipal regulations; but it put upon the parties the burden of showing that it was so tolerated and protected, and in failure of producing such proof, proceeded to condemnation, as it did in the case of that vessel. 'How far that judgment has been universally concurred in and approved,' continued Lord Stowell, 'is not for me to inquire. *If there be those who disapprove of it, I certainly am*⁽ⁱ⁾ *not at liberty to include myself in that number, because the decisions of that court bind authoritatively the conscience*⁽ⁱⁱ⁾ *of this*; its decisions must be conformed to, *and its principles practically adopted*. The principle laid down in that case appears to be, that the slave-trade, carried on by a vessel belonging [206] to a subject of the United States, is a trade which, being unprotected by the domestic regulations of their legislature and government, subjects the vessel engaged in it to a sentence of condemnation. If the ship should therefore turn out to be an American, actually so employed—it⁽ⁱⁱⁱ⁾ matters not, in my opinion, in what stage of the employment, whether in the inception, or the prosecution, or the consummation of it^(iv)—the case of *The Amedie* will bind the conscience of this Court to the effect of compelling it to pronounce a sentence of confiscation.'^(a)

§ 130. In a subsequent case, that of *The Diana*, Lord Stowell limited the application of the doctrine invented by Sir W. Grant, to the special circumstances which distinguished the case of *The Amedie*. *The Diana* was a Swedish vessel, captured by a British cruiser on the coast of Africa whilst actually engaged in carrying slaves to the Swedish West-India possessions. The vessel and cargo were restored to the Swedish owner, on the ground that Sweden had not then prohibited the trade by law or convention, and still continued to tolerate it in practice. It was stated by Lord Stowell, in delivering the judgment of the High Court of Admiralty in this case, that England had abolished the trade as unjust and criminal; but she claimed no right of enforcing that prohibition against the subjects of those States which had not adopted the same opinion; and England did not mean to set herself up as the legislator and *custos morum* for the whole world, or presume to interfere with the commercial regulations of other States. The principle of the case of *The Amedie* was, that where the municipal law of the country to which the parties belonged had prohibited the trade, British tribunals would hold it to be illegal upon general principles of

(a) Dodson's Admiralty Reports, i. 81.

[ⁱ For *disapprove of it, I certainly am* read *disapprove it, I am certainly*.]—G.G.W.

[ⁱⁱ For *the conscience* read *the judicial conscience*.]—G.G.W.

[ⁱⁱⁱ For *employed—it* read *employed*; and *it*.]—G.G.W.

[^{iv} For *it*—read *it*;]—G.G.W.

justice and humanity; but they would respect the property of persons engaged in it under the sanction of the laws of their own country.(a)

The above three cases arose during the continuance of the war, and whilst the laws and treaties prohibiting the slave-trade were incidentally executed through the exercise of the belligerent right of visitation and search.

The *Louis*.

§ 131. In the case of *The Diana*, Lord Stowell had sought to distinguish the circumstances of that case from those of *The Amedie*, so as to raise a distinction between the case of the subjects of a country which had already prohibited the [207] slave-trade, from that of those whose governments still continued to tolerate it. At last came the case of the French vessel called *The Louis*, captured after the general peace, by a British cruiser, and condemned in the inferior Court of Admiralty. Lord Stowell reversed the sentence in 1817, discarding altogether the authority of *The Amedie*, as a precedent, both upon general reasoning, which went to shake that case to its very foundations, and upon the special ground, that even admitting that the trade had been actually prohibited by the municipal laws of France, (which was doubtful,) the right of visitation and search (being an exclusively belligerent right) could not consistently with the law of nations be exercised, in time of peace, to enforce that prohibition by the British courts upon the property of French subjects. In delivering the judgment of the High Court of Admiralty in this case, Lord Stowell held that the slave-trade, though unjust and condemned by the statute law of England, was not piracy, nor was it a crime by the universal law of nations. A court of justice, in the administration of law, must look to the legal standard of morality—a standard which, upon a question of this nature, must be found in the law of nations as fixed and evidenced by general, ancient, and admitted practice, by treaties, and by the general tenor of the laws, ordinances, and formal transactions of civilized States; and looking to these authorities, he found a difficulty in maintaining that the transaction was legally criminal. To make it piracy or a crime by the universal law of nations, it must have been so considered and treated in practice by all civilized States, or made so by virtue of a general convention.

The slave-trade, on the contrary, had been carried on by all nations, including Great Britain, until a very recent period, and was still carried on by Spain and Portugal, and not yet entirely prohibited by France. It was not, therefore, a criminal act by the consuetudinary law of nations; and every nation, independently of special compact, retained a legal right to carry it on. No nation could exercise the right of visitation and search upon the common and unappropriated parts of the ocean, except upon the belligerent claim. No one nation had a right to force its way to the liberation of Africa by trampling on the

(a) Dodson's Admiralty Reports, i. 95.

independence of other States; or to procure an eminent good by means that are unlawful; or to press forward to a great principle by breaking through other great principles that stand in the way. The right [208] of visitation and search on the high seas did not exist in time of peace. If it belonged to one nation it equally belonged to all, and would lead to gigantic mischief and universal war. Other nations had refused to accede to the British proposal of a reciprocal right of search in the African seas; and it would require an express convention to give the right of search in time of peace.(a)⁸⁶

(a) Dodson's Admiralty Reports, ii. 210.

[⁸⁶ *The Amedie, and subsequent Cases.*—A careful examination leads to the belief that the case of *The Amedie*, and those following it, have been misunderstood by the author, as well as by others. The report of *The Amedie* in the Appellate Court discloses so little of the facts, and the opinion is so restricted to the point technically sufficient for a decision, that it might well mislead persons not familiar with the practice of prize courts and not informed of the history of the case. England was at war with Spain; and her Orders in Council had declared that the ports of Cuba were under blockade, except for certain specified kinds of neutral trade. *The Amedie* was captured *jure belli* by a British cruiser in the West Indies. She had a cargo of slaves on board, and was bound from the coast of Africa, under American colors and papers. The ground of capture was, that she was destined to Cuba in violation of blockade. She was libelled as prize, in a British Vice-Admiralty Court in the West Indies, and condemned. The proceeding, from beginning to end, was one of prize of war solely; and her condemnation had nothing to do with her being engaged in the slave trade. An appeal was taken from this decision, and the decree was affirmed by the Appellate Court. The explanation of the fact, that this case has so almost uniformly been cited as one of condemnation of a foreign vessel for being engaged in the slave trade, may be found in the peculiarity of the rules which govern courts of prize in respect to condemnation and restitution.

Where a vessel has been captured as prize of war by a regular cruiser, and the circumstances show the capture to have been with probable cause, so that the captors and the court are in justifiable possession, there are two contingencies, either of which requires a decree of condemnation,—first, where the affirmative proof shows that the vessel is a good prize by the laws of war; and, second, where, in the absence of such proof, or irrespective of it, no intervening party establishes a claim to the property. The absence of claims to the property after sufficient time, or the rejection by the court, for any cause whatever, of the claims made, leaves the property to be condemned as prize, irrespective of the question whether the affirmative proofs, of themselves, make a case for condemnation. It is also to be noticed, that a claim to prize property is an affirmative proceeding, in which the claimant is a plaintiff or actor, and has the *onus* of establishing his title to ownership and possession, and his right to receive the property from the court. A stranger or *amicus curiæ* is not permitted to question the validity of the capture. This is open only to a claimant upon the basis of a right in himself to receive the property in case it should not be condemned. Sometimes, therefore, the prize court, especially on an appeal from condemnation, will give its attention solely or mainly to the legality of the claim; and, if the only claim made is rejected, the condemnation is affirmed as of course. Nor is condemnation for want of legal claim a mere technical rule, but one founded upon the reason that the [209] absence of a good claim to valuable property taken under suspicious circumstances, furnishes a presumption that there are condemnatory facts of which the court has not been able to get possession.

When the case of *The Amedie* came before the Appellate Court, it was argued on both points,—on the affirmative proof that the vessel was violating the rules of war, and on the invalidity of the claim made by the asserted owners. The court, in a single sentence, expressed itself satisfied, that, on all the evidence, the vessel was bound to an enemy's colony which was under blockade, and therefore a good prize; and then proceeded to an examination of the case of the claimant. Assuming the title of the vessel and cargo to be in him, the question was whether the claim was of a character which the court could recognize and enforce. And here it is to be remembered, that a court of prize will reject a claim founded in a transaction

Madrazo
v. Willes.

§ 132. The leading principles of this judgment were confirmed in 1820 by the Court of King's Bench, in the [209] case of *Madrazo v.*

prohibited by positive law, or contrary to universal principles of justice and humanity; and the counsel for the captors had taken the ground that such was the character of the slave trade. The court decided, that, if this vessel was to be considered as *bonâ fide* American, the claim could not be rejected on the sole ground that the British law prohibited the slave trade; for that was a municipal law, and affected only British subjects and territory. The court further held, that the slave trade could not be considered as illegal under the law of nations, so as to authorize a prize court to treat it as illegal in the case of a citizen of a State which permitted it. The ground taken by the court was, that, in the then condition of British law, and of the laws and treaties of most civilized nations, the slave trade must be considered as *primâ facie* illegal; thus throwing on the claimant the burden of proving that the trade is allowed by the law of his own country. As the law of the United States prohibited the slave trade, treated slaves *in transitu* from Africa as free, declared a vessel so engaged forfeited, and punished the parties concerned with severe penalties, the claimant certainly failed to establish his right. The court therefore, confirmed the decree of the court below, on two grounds, either of which was sufficient,—*first*, that the proof of attempt to violate blockade was satisfactory, as an affirmative ground for condemnation; and, *second*, that, irrespective of that ground, the claim of the American owner must be dismissed as one not enforceable in a prize court by reason of the laws both of the United States and Great Britain respecting the slave trade. On either ground, therefore, the vessel was condemned solely as prize of war. Yet this case has been represented by eminent writers as a decision that British cruisers, even in time of peace, may visit and search vessels of any nation, or at least of a nation that prohibits the slave trade, on suspicion of being engaged in that trade; and that vessels of such a nation found to be so engaged will be condemned in a British court on that ground. (See this case in Acton, i. 240; and Dodson, i. 84, note.)

The cases of *The Africa* (Acton, ii. 1), *The Nancy* (Ib. 2),^[1] and *The Anne* (Ib. 6), were all likewise prize causes; and the capture and condemnation in each were *jure belli*, and not for being engaged in the slave trade. The possession of the captors being justifiable, the court rejected the claims of asserted owners, partly on the same grounds as in *The Amedie*, and partly, for causes connected with the laws of war.

The Fortuna (Dodson, i. 81).—This was exclusively a prize cause. The vessel was captured and condemned as prize of war. The claimant was an American. On appeal, the only question considered was, whether the claim was established by proofs, and was of such character that it could be admitted. It was held, on the [210] authority of *The Amedie*, that, the vessel being American and the slave trade illegal by American law, and the negroes by that law free, the claimant was not entitled to receive his negroes or their value from a prize court of England. The claim being dismissed, the decree below of condemnation, as prize of war, was affirmed, as of course. What direct evidence there was showing the vessel to have violated belligerent rights does not appear, nor, in strictness of law, was it necessary that it should appear.

The Diana (Dodson, i. 95).—This is well styled by Lord Stowell a 'mongrel case.'^[1] The pleadings and proceedings in the Vice-Admiralty Court were partly prize and partly civil, or *instance*; the decree was solely as prize; while the appeal was to a court having only a civil, appellate jurisdiction. The vessel was held to be Swedish, engaged in the slave trade to a Swedish island; and the court decided that the law of Sweden permitted the trade. The claim was, therefore, one that the court could entertain, within the rule in *The Amedie*. The court treated the cause as one of civil forfeiture only; and, no ground for that appearing, the property was restored.

Le Louis (Dodson, ii. 210).—This is the case which is treated by Mr. Wheaton and most others as having overruled *The Amedie*. It was a civil cause for forfeiture, and has no relation to prize law or its presumptions or rules. The grounds taken by the counsel for the captors were, that the vessel was French, and engaged in the slave trade, which was prohibited by French law, and, as argued, by the law of nations; and, further, that the crew had resisted the boarding and search by the king's ship, and killed some of its crew, and were therefore guilty of piracy, and out of the protection of the law of nations.

The court held, that the boarding and search, by the king's cruiser, of a foreign vessel in

[¹ For (Ib. 2) read (Ib. 4).]—G.G.W.

[¹ For case read proceeding.]—G.G.W.

Willes, in which the point of the illegality of the slave-trade, under the general law of nations, came incidentally in question. The court held that the British statutes against the [210] slave-trade were applicable to British subjects only. The British Parliament could not prevent the subjects of other States from carrying on the trade out of the limits of the British dominions. [211] If a ship be acting contrary to the general law of nations, she is thereby subject to condemnation; but it was impossible to say that the slave-trade is contrary to the law of nations. It was, until lately, carried on by all the nations of Europe; and a practice so sanctioned could only be rendered illegal on the principles of international law, by the consent of all the powers. Many States had so consented, but others had not; and the adjudged cases had gone no farther than to establish the rule, that ships belonging to countries that had prohibited the trade were liable to capture and condemnation, if found engaged in it. (a)⁸⁷

§ 133. A similar course of reasoning was adopted by the Supreme Court of the United States in the case of Spanish and Portuguese The Antelope.

time of peace, and not on suspicion of piracy *jure gentium*, but of being engaged in the slave trade, were unjustifiable, and consequently that resistance to them was not piratical; and that the slave trade was not piracy *jure gentium*, nor prohibited by the law of France. Therefore it was clear that the vessel not only could not be decreed forfeited by any British tribunal, but was illegally seized and brought before the court. The original taking was illegal.

In this cause, Sir William Scott made a learned and judicious explanation of the various positions which had been taken by writers and statesmen as to the right of visit, search, and bringing in for adjudication; and of the progress of law and opinion on the subject of the slave trade: but it will be found that this case in no sense overrules *The Amedie*, or those that followed it.

In *The Amedie*, the visit, search, capture, and bringing in were in the exercise of belligerent right. In *The Louis*, they were in time of peace, and solely for the purpose of suppressing the slave trade. In *The Amedie*, the proceedings were in prize, before a prize court, and governed by the law and rules of prize. In *The Louis*, they were civil, and governed by the law and rules of civil forfeiture. In *The Amedie*, the condemnation was as prize of war. In *The Louis*, if the vessel had been condemned, it could have been only for being engaged in the slave trade. In *The Amedie*, the capture and bringing in were justifiable, and the court had clear jurisdiction. In *The Louis*, the capture and bringing in were unjustifiable; and the general duty of the court was to restore, if a proper claimant appeared. In *The Amedie*, the burden was on the claimant to show legal title and a right to receive the property. In *The Louis*, the burden was on the seizers to show cause for [211] forfeiture. In *The Amedie*, the claim was rejected because the slave trade, though not universally illegal, or piracy *jure gentium*, was illegal by the law of the claimant's country. In *The Louis*, the claim was sustained, because the slave trade was neither illegal by the law of nations, nor by the law of the claimant's country.

It may be and probably is true, that British cruisers made use of their belligerent right of search to discover slaves, and took advantage of the severe and summary rules of war tribunals to secure the condemnation of their prizes; but this is only saying that they made an undue use of opportunities which the criminality of their antagonists put in their power, and does not touch the law decided.

The result is, that the precedents, from *The Amedie* to *The Louis*, will be found consistent with each other, and with the rules of prize courts, and with the law of nations as to the slave trade.]—D.

(a) *Barnwell's* (1) & *Alderson's Reports*, iii. 353.

[⁸⁷ *Madrazo v. Willes* has since been confirmed by the decision of the Exchequer Chamber in the case of *Santos v. Illidge*.]—D.

[1 For *Barnwell's* read *Barnewall's*.]—G.G.W.

vessels captured by American cruisers, whilst the trade was still tolerated by the laws of Spain and Portugal.⁸⁸ It was stated by Mr. Chief Justice Marshall, in delivering [212] the judgment of the court, that it could hardly be denied that the slave-trade was contrary to the law of nature. That every man had a natural right to the fruits of his own labor, was generally admitted; and that no other person could rightfully deprive him of those fruits, and appropriate them against his will, seemed to be the necessary result of this admission. But, from the earliest times, war had existed, and war conferred rights in which all had acquiesced. Among the most enlightened nations of antiquity, one of these rights was, that the victor might enslave the vanquished. That which was the usage of all nations could not be pronounced repugnant to the law of nations, which was certainly to be tried by the test of general usage. That which had received the assent of all must be the law of all.

Slavery, then, had its origin in force; but as the world had agreed that it was a legitimate result of force, the state of things which was thus produced by general consent could not be pronounced unlawful.

Throughout Christendom this harsh rule had been exploded, and war was no longer considered as giving a right to enslave captives. But this triumph had not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa had not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. The question then was, could those who had renounced this law be permitted to participate in its effects by purchasing the human beings who are its victims?

Whatever might be the answer of a moralist to this question, a

[⁸⁸ *The Antelope. Slave Trade.*—The *Antelope*, Wheaton's Rep. x. 66, was not a prize case, but one for civil forfeiture. The general doctrines of the case, as applied to a slave trader, may be stated thus: (1) A cruiser of a State which prohibits the slave trade cannot search or seize a foreign vessel at sea on suspicion of being engaged in that trade. (2) If that is done, and the vessel comes under cognizance of the court of the cruiser's sovereign, its general duty is to treat the vessel as if she had not been seized, and to restore her. (3) In making restitution, the court may look beyond possession, and inquire into right. It will do this, and will reject the claim of the original and prior captors from whose possession the vessel was wrongfully taken, and treat their capture also as if it had not been made, if it appears that they made ostensibly a belligerent capture, but equipped themselves for their cruise in violation of the neutrality laws of the nation to which the court belongs. (4) Coming back thus to the owners from whom the first capture was made, the court may look beyond their possession and inquire into their title. If they are foreigners, and their nation allows the slave trade,—in which their vessel is found to be engaged,—and their private titles are sufficiently proved, restitution is made to them. If they are citizens of a nation [212] whose laws prohibit the trade, the slaves are treated as that law requires. On the first part of this proposition—the restoration of slaves to foreigners whose laws allow the trade—the court was equally divided. The reasons for the division, and the exact nature of it, are withheld by the court; but the division operated to confirm the decree of the court below, which was of restitution to the foreigners so claiming.]—D.

jurist must search for its legal solution in those principles which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question must be considered as decided in favor of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, [213] it was carried on without opposition, and without censure. A jurist could not say that a practice thus supported was illegal, and that those engaged in it might be punished, either personally or by deprivation of property.

In this commerce, thus sanctioned by universal assent, every nation had an equal right to engage. No principle of general law was more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which was vested in all by the consent of all, could be divested only by consent; and this trade, in which all had participated, must remain lawful to those who could not be induced to relinquish it. As no nation could prescribe a rule for others, no one could make a law of nations; and this traffic remained lawful to those whose governments had not forbidden it.

If it was consistent with the law of nations, it could not in itself be piracy. It could be made so only by statute; and the obligation of the statute could not transcend the legislative power of the State which might enact it.

If the trade was neither repugnant to the law of nations, nor piratical, it was almost superfluous to say in that court that the right of bringing in for adjudication, in time of peace, even where the vessel belonged to a nation which had prohibited the trade, could not exist. The courts of justice of no country executed the penal laws of another; and the course of policy of the American government on the subject of visitation and search, would decide any case against the captors in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating the municipal laws of the United States. It followed that a foreign vessel engaged in the African slave-trade, captured on the high seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored to the original owners. (a)⁸⁹

(a) Wheaton's Rep. x. 66, *The Antelope*.

[⁸⁹ *Slave Trade. Visit and Search*.—The entire subject of the slave trade, in its international relations, may now be summed up in three principal aspects, referring to previous notes, Nos. 85, 'Slave Trade as Piracy,' and 86 and 88:—

First, ITS JUDICIAL ASPECT. It has been shown in the notes of the editor (*ante*, notes Nos. 85 and 86), that no English court has held the slave trade to be piracy *jure gentium*.

Extent of
the judicial
powers as to
property
within the
territory.

[214] § 134. II. The judicial power of every State extends to all civil proceedings *in rem*, relating to real or personal property within the territory.

In *The Amedie*, it was only said that it was *prima facie* an illegal trade [214] everywhere; and, when a person claimed to have redelivered to him negroes, or the value of negroes, whom he was transporting from Africa into slavery, the burden was on him to prove that his nation permitted that trade. In the United States, there was a conflict in the inferior tribunals; but the Supreme Court, in *The Antelope*, decided that the trade was not piracy *jure gentium*. As to the right of search and bringing in for trial,—that has, in the courts of both countries, followed the test of piracy *jure gentium*, and been excluded. No doubt has been suggested that the American courts have denied all right of search, unless for piracy *jure gentium*. That right was held to be inseparable from a right to bring in for adjudication, and could be used for no purpose for which the court had not jurisdiction, as it unquestionably had not over foreign vessels on the high seas, where neither war nor piracy was involved. It has been thought that the English courts have asserted a right of search, while they admitted that the trade was not piracy *jure gentium*. The examination of the cases in note No. 86, *ante*, shows, it is hoped, that no such right of search has been supported by those courts. There is no case to be found in which an English court of the last resort has directly decided, that, in time of peace, when there was no color of belligerent right, a British cruiser could search a foreign vessel on the ground of suspicion of being a slaver; and, in the cases of civil proceedings, as *The Diana and Louis*, the seizure was considered illegal. No case has been found where, either in England or the United States, a distinction has been sustained by the court between a right of visit and a right of search.

Second, IN THE OPINIONS OF STATESMEN AND JURISTS. The statesmen of America, in their diplomatic correspondence, have always contended that a state of things had not been reached which entitled all nations to treat the slave trade as piracy *jure gentium*. This has been the opinion of the American commentators,—Wheaton, Kent, Halleck, and Woolsey. As to the right of search, our statesmen and jurists have agreed that a right of search did not exist, and that no distinction in principle existed between a right to visit and a right to search. Mr. Webster, Mr. Wheaton, Mr. Cass, Mr. Legare, Mr. Stevenson, and Mr. Seward have severally discussed this subject, in their official action, and have agreed in the reasoning, that no nation can exercise police jurisdiction over private vessels of other nations on the high seas; that such jurisdiction is limited to international questions of war or of piracy *jure gentium*; that the right to detain and search vessels of other nations at sea was only a means of enforcing a jurisdiction admitted,—that is, in international matters of war or of piracy *jure gentium*. They denied all distinction in principle between visit and search, *as rights*, though the two things might be very different in their effects. If the visit is for the purpose for which search is allowed,—that is, in case of war or piracy,—it is justifiable as a part of the process of investigation. A right to visit without the right to require production of papers or persons, or to make any examination, is futile, even if the purpose is to ascertain only national character, and not guilt or innocence; and any right to compel production of papers or persons, or to subject to interrogation, or to make examination of parts of a vessel, is a right of search. A right to stop a foreign vessel and visit her must carry the right to use the requisite force, if the exercise of the right is resisted. If not, it is not a right in any [215] sense worth disputing. The question, then, is on a right, forcibly if necessary, to stop and board foreign vessels, and to make some kinds of inquiries and examinations. The only defence made for the right of visit, by those who disclaim a right of search, is, that the purpose of the visit is to verify the national character of the vessel, and ascertain whether she belongs to the same nation with the cruiser, or to one with which that nation has treaties giving a right of search; in order that, if so, the cruiser may search or detain, or otherwise deal with, such vessel as the law of his country or the treaties may allow; while, if she turns out to belong to another power which has given no right of search, it will be his duty to release her, whatever the evidence of her guilt. But, apart from the consideration that visit without search, even for the limited purpose described, is futile and a mere annoyance, the ground is taken, that all visiting or detaining or searching by compulsion, exercised by a cruiser upon a vessel of another power, is a violation of right, except where there is agreement; and that the *consensus gentium* has extended it only to war, and crimes against all nations. A right to visit, subject to a duty to make apology

This follows, in respect to real property, as a necessary consequence of the rule relating to the application of the [215] *lex loci rei sitæ*. As

and reparation in case the vessel turns out to be one not subject to visit, is not a right at all, but an admission that the visit was against right.

The British Government, in former times, have claimed and exercised a right to search vessels suspected of being slavers. No exact limits to the right were laid down or regarded, whether as confined to ascertaining nationality, or as extending to proofs of guilt or innocence. Lord Palmerston, in reply to Mr. Stevenson, Aug. 27, 1841, avowed the intention of Great Britain to stop vessels of all nations on suspicion of being engaged in the slave trade; limiting the examination to the verifying of the national character the vessel may assume, and ascertaining whether she is 'navigated according to law.' That he claimed as a right. It was resisted by Mr. Stevenson, in his reply. Lord Aberdeen's rejoinder of Oct. 13, 1841, adhered to the claim of right, promising only safeguards against its abuse; and the further correspondence between Lord Aberdeen and Mr. Everett did not vary the posture of the case. The treaty of 1842 closed the discussion for the time. Art. 8 of that treaty is a stipulation for a naval force of each country 'to enforce, separately and respectively, the laws, rights, and obligations of each of the two countries.' It was understood that Great Britain practically waived the claim while the treaty remained in force.

In 1858, British cruisers had stopped American vessels off the island of Cuba, and made some examination, slight to be sure, as to their destination and national character. The American Government at once called the attention of Great Britain to the subject; and Lord Derby's Government took the opinion of the law-officers of the crown as to a right of visit or search, either or both, in time of peace. That opinion was decidedly that no right existed, in time of peace, to stop, visit, or search. After receiving this opinion, the British Government answered to the United States that they claimed no right either to visit or search; and, suggesting the frequent cases of the abuse of the American flag by slavers, and the safety this state of the law practically gave them, requested the American Government to suggest some mode by [216] which the difficulty could be remedied. The diplomatic correspondence, however, resulted only in settling the question against the right of visit or search. In the debate which followed in the House of Lords, Lord Lyndhurst said, that England had not given up the right of visit, for there was never such a right, but had abandoned the assumption of a right that never existed. He declared, that no writer on international law asserted such a right; and no court having jurisdiction had ever sustained it. He further showed, that there was no distinction in principle, and but little in fact, between search and a visit for the purpose of verifying the national character of a vessel. Lord Malmesbury, then Secretary for Foreign Affairs, said, that England had abandoned a claim of right either to visit or search; and Lord Aberdeen said, that the question was virtually settled at the time of the treaty of 1842. (Annual Register, 1858, pp. 185-189, 191-196.) Afterwards, in 1859, on the production of the correspondence between the two governments, Lord Malmesbury admitted, that England had formerly exercised a power of search, but not founded in right and not supported by international law, when she had the only strong navy afloat; that, when France rebuilt her navy, she and the United States had objected to this exercise, and, after negotiations and practical settlements by treaties, the claim was at last abandoned. Lords Clarendon, Derby, Brougham, and Carlisle agreed that there was no right of visit: still, if the debate is correctly reported, there seems to be some confusion between the option of a cruiser, at his peril, to take his chance of a vessel turning out to have been liable to be detained by him, and the right of a cruiser to detain the vessel for the purpose of putting the test. The principle, however, is clear. If a cruiser stops a vessel in the exercise of police power, he takes the chance of her turning out to be subject to the exercise of that power by him. If she proves to be a vessel of his own nation, or of one that has conceded to him that right, he turns out to have been in the exercise of a right *ab initio*; and neither he nor his nation is bound to make apology or compensation, though the vessel proves innocent of the crime suspected. But, if the vessel proves not to be subject to his police power, then he turns out to have been a trespasser *ab initio*, whether the vessel proves innocent or guilty of the crime suspected. He is liable in that case, not for having stopped an innocent vessel, but for having stopped one not subject to his inspection. The mistake of the cruiser, however natural or honest, is not a justification. It is only an excuse, addressing itself to the consideration of the government whose vessel he has interfered with.

What has been said heretofore by unofficial writers is of less consequence, now that

every thing relating to the tenure, title, and transfer of real property (*immobilia*) is regulated by the local law, so also the proceedings in courts of justice relating to that species of property, such as the rules of evidence and of prescription, the forms of action and pleadings, must necessarily be governed by the same law. (a)

Distinction
between the
rule of de-
cision and
the rule of
procedure as
affecting
cases *in rem*.

[216] § 135. A similar rule applies to all civil proceedings *in rem*, respecting personal property (*mobilia*) within the territory, which must also be regulated by the local law, with this qualification, that foreign laws may furnish the rule of decision in cases where they apply, whilst

nations themselves have taken the matter in hand and settled it. It is of historical interest, however, to record that Hautefeuille (*Droits des Nat. Neutr.* tom. iii. p. 471-487), Massé (*Droit Comm.* i. 291), Ortolan (*Règl. Intern.* i. 242, 258-262), and De Cussy (*Droit Marit.* ii. 385) agree with Wheaton, that neither visit nor search can be exercised in time of peace; and such seems to be the opinion of Riquelme (i. 236), Heffter (*europ. Völk.* § 168), and De Pistoye et Duverdy (*Traité des Prises*, tit. i. ch. 3, § 2). Dr. Twiss, in his opinion furnished to the Italian Government, March 22, 1858, in the case of *The Cagliari*, says that, in time of peace, no apprehension of a violation of municipal law gives a cruiser a right to detain and visit a vessel at [217] sea. Kent, in the text of his *Commentaries*, does not notice a distinction between visit and search; but, in a note to page 153⁽¹⁾ (a) in later editions, a right of approach or inter-visitation of vessels at sea, to ascertain nationality, seems to be admitted. Dr. Phillimore (iii. 420-424) defends the distinction, and cites the note to Kent with approbation. At the same time, he seems to think the question is, whether a British cruiser may stop and visit a vessel under an American flag; and that the United States have denied such a right (p. 421). But the carrying American flags or papers is a fact as to which nothing can be predicated affecting a right to visit. If the vessel was American, she was exempt; if not, the American Government claims no interest, although she carried its flag. If an officer is required by his warrant to arrest John Doe, charged with a crime, and stops a man wearing the dress and using the name of Richard Roe, and compels him to submit to reasonable examinations of his person and papers to ascertain, not his guilt or innocence, but whether he is John Doe,—then, if he turns out to be John Doe, Richard Roe has no cause of complaint; but, if he proves to be Richard Roe, the officer is a trespasser, though acting in good faith. This analogy may serve to clear up the mist that seems to cover the subject as it has been viewed by some writers. Halleck (*Intern. Law*, 597-605) carefully examines the subject, and declares that no continental writer has recognized the distinction between visit and search *as rights*, in time of peace; denies the accuracy of the reasoning of Dr. Phillimore; and suggests that the note to Kent contradicts the text, and rests on the authority of the annotator, and not of Kent himself. It is needless to say that Mr. Wheaton, in his diplomatic correspondence as well as in his tracts and commentaries, has always denied the distinction, in principle as well as on authority. Dr. Woolsey (§ 196) agrees, that neither visit nor search can be made, as a right, to ascertain national character; but offers a suggestion (§ 201), that such inquiry as is necessary to ascertain nationality might well be granted by nations.

Third, CONVENTIONS AND PRACTICE OF NATIONS. The details of the treaties on this point are given in note 85, *ante*, 'Slave Trade as Piracy.' The summary may be stated thus: Nations do not agree that the slave trade is piracy. When treated as such, it is under municipal law, or between two or more nations by virtue of treaties confessedly in addition to the law of nations. No treaties distinguish between a right of visit and a right of search. Where nations have conceded to the cruisers of each other any reciprocal right in time of peace over vessels of each other, whether generally or within geographical limits, the right conceded has been a right to make such detention and examination as is reasonable for the ascertainment both of national character and of guilt or innocence; and they usually either provide for trial by mixed tribunals, or require the persons found on board to be sent for trial to the nation to which they belonged.]—D.

(a) *Vide supra*, § 81.

[¹ For to page 153 read to Vol. I, page 153.]—G.G.W.

the forms of process, and rules of evidence and prescription are still [217] governed by the *lex fori*.⁹⁰ Thus the *lex domicilii* forms the law in respect to a testament of personal property or succession *ab intestato*, if the will is made, or the party on whom the succession devolves resides, in a foreign country; whilst at the same time the *lex fori* of the State in whose tribunals the suit is pending determines the forms of process and the rules of evidence and prescription.

[218] § 136. Though the distribution of the personal effects of an intestate is to be made according to the law of the place where the deceased was domiciled, it does not therefore follow that the distribution is in all cases to be made by the tribunals of that place to the exclusion of those of the country where the property is situate. Whether the tribunal of the State where the property lies is to decree distribution, or to remit the property abroad, is a matter of judicial discretion to be exercised according to the circumstances. It is the duty of every government to protect its own citizens in the recovery of their debts and other just claims; and in the case of a solvent estate it would be an unreasonable and useless comity to send the funds abroad, and the resident creditor after them. But if the estate be insolvent, it ought not to be sequestered for the exclusive benefit of the subjects of the State where it lies. In all civilized countries, foreigners in such a case, are entitled to prove their debts and share in the distribution.^(a)

Succession to personal property *ab intestato*.

§ 137. Though the forms in which a testament of personal property, made in a foreign country, is to be executed, are regulated by the local law, such a testament cannot be carried into effect in the State where the property lies until, in the language of the law of England, *probate* has been obtained in the proper tribunal of such State, or, in the language of the civilians, it has been *homologated*, or registered, in such tribunal.^(a)

Foreign will, how carried into effect in another country.

So, also, a foreign executor, constituted such by the will of the testator, cannot exercise his authority in another State without taking out letters of administration in the proper local court. Nor can the administrator of a succession *ab intestato*, appointed *ex officio* under the laws of a foreign State, interfere with the personal property in another State belonging to the succession, without having his authority confirmed by the local tribunal.

§ 138. The judgment or sentence of a foreign tribunal of competent jurisdiction proceeding *in rem*, such as the sentences of Prize Courts under the law of nations, or Admiralty and Exchequer, or other

Conclusiveness of foreign sentences *in rem*.

[⁹⁰ Savigny (System, viii. §§ 366-7) contends for the *lex loci rei sitæ* in *mobilia*, as well as *immobilia*, as the most reasonable and convenient. Woolsey (Introd. § 71) seems to lean to that opinion, to which he says the German publicists also incline.]—D.

(a) Kent's Comm. on American Law, 5th edit. ii. 431, 432, and the cases there cited.

(a) Wheaton's Rep. xii. 169, *Armstrong v. Lear*. Code Civil, liv. iii. tit. 2, art. 1000.

revenue courts, [219] under the municipal law, are conclusive as to the proprietary interest in, and title to, the thing in question, wherever the same comes incidentally in controversy in another State.

Whatever doubts may exist as to the conclusiveness of foreign sentences in respect of facts collaterally involved in the judgment, the peace of the civilized world and the general security and convenience of commerce obviously require, that full and complete effect should be given to such sentences, wherever the title to the specific property, which has been once determined in a competent tribunal, is again drawn in question in any other court or country.

Transfer of
property
under for-
eign bank-
rupt pro-
ceedings.

§ 139. How far a bankruptcy declared under the laws of one country will affect the real and personal property of the bankrupt situate in another State, is a question of which the usage of nations, and the opinions of civilians, furnish no satisfactory solution. Even as between co-ordinate States, belonging to the same common empire, it has been doubted how far the assignment under the bankrupt-laws of one country will operate a transfer of property in another. In respect to real property, which generally has some indelible characteristics impressed upon it by the local law, these difficulties are enhanced in those cases where the *lex loci rei sitæ* requires some formal act to be done by the bankrupt, or his attorney specially constituted, in the place where the property lies, in order to consummate the transfer. In those countries where the theory of the English bankrupt system, that the assignment transfers all the property of the bankrupt, wherever situate, is admitted in practice, the local tribunals would probably be ancillary to the execution of the assignment by compelling the bankrupt, or his attorney, to execute such formal acts as are required by the local laws to complete the conveyance. (a)

The practice of the English Court of Chancery, in assuming jurisdiction incidentally of questions affecting the title to lands in the British colonies, in the exercise of its jurisdiction *in personam*, where the party resides in England, and thus compelling him, indirectly, to give effect to its decrees as to real property situate out of its local jurisdiction, seems very questionable on principle, unless where it is restrained to the case of a party who has fraudu[220]lently obtained an undue advantage over other creditors by judicial proceedings instituted without personal notice to the defendant.

But whatever effect may, in general, be attributed to the assignment in bankruptcy as to property situate in another State, it is evident that it cannot operate where one creditor has fairly obtained, by legal

(a) See Lord Eldon's Observations in *Selkirk v. Davies*, Rose's Cases in Bankruptcy, ii. 311. Vesey's Rep. ix. 77, *Banfield v. Solomon*.⁽¹⁾

⁽¹⁾ For Vesey's Rep. ix. 77, *Banfield v. Solomon* read Vesey Jr., Rep. ix. 77, *Benfield v. Solomons*.] —G.G.W.

diligence, a specific lien and right of preference, under the laws of the country where the property is situate. (b)

§ 140. III. The judicial power of every State may be extended to all controversies respecting personal rights and contracts, or injuries to the person or property, when the party resides within the territory, wherever the cause of action may have originated.

Extent of the judicial power over foreigners residing within the territory.

This general principle is entirely independent of the rule of decision which is to govern the tribunal. The rule of decision may be the law of the country where the judge is sitting, or it may be the law of a foreign State in cases where it applies; but that does not affect the question of jurisdiction, which depends, or may be made to depend, exclusively upon the residence of the party.

The operation of the general rule of international law, as to civil jurisdiction, extending to all persons who owe even a temporary allegiance to the State, may be limited by the positive institutions of any particular country. It is the duty, as well as the right, of every nation to administer justice to its own citizens; but there is no uniform and constant practice of nations, as to taking cognizance of controversies between foreigners. It may be assumed or declined, at the discretion of each State, guided by such motives as may influence its juridical policy. All real and possessory actions may be brought, and indeed must be brought, in the place where the property lies; but the law of England, and of other countries, where the English common law forms the basis of the local jurisprudence, considers all personal actions, whether arising *ex delicto* or *ex contractu*, as transitory; and permits them to be brought in the domestic forum, whoever may be the parties, and wherever the cause of action may originate. This rule is supported by a legal fiction, which supposes [221] the injury to have been inflicted, or the contract to have been made, within the local jurisdiction. In the countries which have modelled their municipal jurisprudence upon the Roman civil law, the maxim of that code, *actor sequitur forum rei*, is generally followed; and personal actions must therefore be brought in the tribunals of the place where the defendant has acquired a fixed domicil.

Depends upon municipal regulations.

Law of England and America.

§ 141. By the law of France, foreigners who have established their domicil in the country by special license (*autorisation*) of the king, are entitled to all civil rights, and, among others, to that of suing in the local tribunals as French subjects. Under other circumstances, these tribunals have jurisdiction, where foreigners are parties, in the following cases only:—

French law.

1. Where the contract is made in France, or elsewhere, between foreigners and French subjects.

2. In commercial matters, on all contracts made in France, with

(b) Kent's Comm. on American Law, ii. 404-408, 5th edit.

whomsoever made, where the parties have elected a domicile, in which they are liable to be sued, either by the express terms of the contract, or by necessary implication resulting from its nature.

3. Where foreigners voluntarily submit their controversies to the decision of the French tribunals, by waiving a plea to the jurisdiction.

In all other cases, where foreigners, not domiciled in France by special license of the king, are concerned, the French tribunals decline jurisdiction, even when the contract is made in France.^(a)

A late excellent writer on private international law considers this jurisprudence, which deprives a foreigner, not domiciled in France, of the faculty of bringing a suit in the French tribunals against another foreigner, as inconsistent with the European law of nations. The Roman law had recognized the principle, that all contracts the most usual among men arise from the law of nations, *ex jure gentium*; in other words, these contracts are valid, whether made between foreigners, or between foreigners and citizens, or [222] between citizens of the same State. This principle has been incorporated into the modern law of nations, which recognizes the right of foreigners to contract within the territorial limits of another State. This right necessarily draws after it the authority of the local tribunals to enforce the contracts thus made, whether the suit is brought by foreigners or by citizens.^(b)⁹¹

Proceeding
against ab-
sent parties.

§ 142. The practice which prevails in some countries, of proceeding against absent parties, who are not only foreigners, but have not acquired a domicile within the territory, by means of some formal public notice, like that of the *viis et modis* of the Roman civil law, without actual personal notice of the suit, cannot be reconciled with the principles of international justice. So far, indeed, as it merely affects the specific property of the absent debtor within the territory, attaching it for the benefit of a particular creditor, who is thus permitted to gain a preference by superior diligence, or for the general benefit of all the creditors who come in within a certain fixed period, and claim the

(a) Code Civil, arts. 13, 14, 15. Code de Commerce, art. 631. Discussions sur le Code Civil, tom. i. p. 48. Pothier, Procédure Civile, partie i. ch. 1, p. 2. Valin sur l'Ord. de la Marine, tom. i. pp. 113, 253, 254. Pardessus, Droit Commercial, Part VI. tit. 7, ch. 1, § 1.

(b) Fœlix, Droit International Privé, §§ 122, 123.

[⁹¹ In the United States, proceedings are not allowed in the way of private suits by citizens against non-residents who are not personally subject to the jurisdiction of the court, and have no property within its control, for the purpose of obtaining a judgment *ex parte* to establish the debt. If the non-resident has property which can be attached by the process of the court, the citizen may proceed *ex parte*, after such notice as the statutes require or the courts order, and prove his claim, and satisfy it from the property seized. But the judgment is not conclusive as to the subject-matter of the suit; and usually there are provisions that the plaintiff, before satisfying his claim, shall furnish security to restore the property in case the defendant shall appear within a certain time, and succeed in reversing the judgment. Proceedings *in rem* rest on a different principle, as they are brought to enforce a right in the thing itself; and the general owner is bound to take cognizance of such demands, and to be prepared to meet them wherever the property may be.]—D.

benefit of a ratable distribution, such a practice may be tolerated; and in the administration of international bankrupt-law it is frequently allowed to give a preference to the attaching creditor, against the law of what is termed the *locus concursus creditorum*, which is the place of the debtor's domicil.

§ 143. Where the tribunal has jurisdiction, the rule of decision is the law applicable to the case, whether it be the municipal or a foreign code; but the rule of proceeding is generally determined by the *lex fori* of the place where the suit is pending. But it is not always easy to distinguish the rule of decision from the rule of proceed[223]ing. It may, however, be stated in general, that whatever belongs to the obligation of the contract is regulated by the *lex domicilii*, or the *lex loci contractus*, and whatever belongs to the remedy for enforcing the contract is regulated by the *lex fori*.⁹²

Distinction between the rule of decision and rule of proceeding, in cases of contract.

[⁹² *Limitations and Prescription.*—A rule simply limiting the time within which proceedings at law may be commenced, is properly called a rule of limitations. Such rules are established by positive enactment, by the legislative power, and are called in England and America, 'statutes of limitations.' They rest on the policy of the State, *ut sit finis litium*; although they are further justified by the presumption that a stale claim is not a valid claim. In the absence of a statute of limitations, rules have been laid down by the courts, as in chancery and admiralty, against stale claims, and the periods of time are usually fixed by analogy to the statutes of limitations in like cases; but, as courts cannot properly enact an arbitrary rule on grounds of public policy, such judicial rules rest on the presumption that the claim is satisfied, or was never valid, and sometimes admit of evidence to rebut the presumption. But the legislative enactments of later times, as now construed by the courts, are absolutely extinctive of a right of action, irrespective of its merits, on general grounds of policy; and an action so barred is not maintainable. Limitations are applied alike to criminal and civil proceedings, and to suits to try the right of ownership or use in corporeal things, whether movable or immovable, as well as to suits on mere personal obligations. Now, as these statutes are rules of repose, resting on the policy of the State, it seems reasonable that any State may apply them to all suits in which the aid of its tribunals is invoked; whether the parties are citizens or aliens; whether the thing in dispute is within or without the territory of the State, and be movable or immovable, corporeal or incorporeal. It is true, that a statute of limitations indirectly operates upon title to property, and has the same effect in aid of the party sued as a defensive prescription, and so it may be argued that they belong to the laws of property and not of mere remedy; but it is impossible, in international law, to be governed by these indirect operations. The tribunal may simply decline to lend its aid to the plaintiff or actor, on the ground of a domestic policy of repose prescribed by the sovereign power; and other nations cannot complain, if no discrimination is made against their citizens.

It has sometimes been said, that the continental writers treat statutes of limitations as part of the law of property and obligations, and therefore not necessarily to be governed by the *lex fori*. Savigny and Foelix have been adduced as instances. But any language that may be cited to that effect will be found to relate to prescription, and not to mere rules of limitation. Rules of prescription relate directly to ownership, or title in a thing, and are part of the law of property. This is especially the case in the Roman law, and in the systems of those countries whose basis is the Roman law. Prescription, by those systems, is not merely defensive, but creative. As all personal rights in things may be said to originate in occupancy, the Roman law has recognized a possession, begun in a certain manner and continued for a certain time, as creative of a positive title. Such possession does not merely afford presumption of some acts necessary to create title, as of original occupation of a thing unoccupied, or of a transfer from the previous owner, but it is itself a prescribed mode of lawful acquisition. For this reason, it was required to originate *bonâ fide* and *justo titulo*; that is to say, the possession must have been begun in an honest belief of a right, justified by an apparently regular proceeding.

[224] If the tribunal is called upon to apply to the case the law of the country where it sits, as between persons domiciled in that country, no difficulty can possibly arise. As the obligation of the contract and the remedy to enforce it are both derived from the municipal law, the rule of decision and the rule of proceeding must be sought in the same code. In other cases, it is necessary to distinguish with accuracy between the obligation and the remedy.

The obligation of the contract, then, may be said to consist of the following parts:—

1. The personal capacity of the parties to contract.
2. The will of the parties expressed, as to the terms and conditions of the contract.

[225] 3. The external form of the contract.

The personal capacity of parties to contract depends upon those personal qualities which are annexed to their civil condition, by the municipal law of their own State, and which travel with them wherever they go, and attach to them in whatever foreign country they are

Without attempting to follow the Roman law from the strict *usucapio*, through the pretorian edict, to the imperial constitutions, it is enough to say, that such a possession, continued for the appointed time, gave all the [224] elements of an affirmative title. And these rules respecting creative and defensive prescription belonged to a distinct class from the rules limiting the commencement of actions; and the latter were of less consequence for the protection of rights inherent in things, as the system of prescriptions was so effective for both creative and defensive purposes.

Without attempting to settle the doubts that involve the subject of prescription, in the interesting early history presented by Bracton and Coke, it may be said, that, in the systems of the United States and England, resting on the common law, the titles of parties in possession have been secured rather by limitations of actions, extinctive of remedies by parties out of possession, than by systems of acquisitive prescription. Yet, in the common law, whatever it was originally, and notwithstanding dicta from high authority to the contrary, prescription may be considered as having become limited to incorporeal rights, as of easements or servitudes on land, and to have required an origin adverse to the general title, and to rest upon a presumption of a grant made by the proprietor in derogation of that title. This places it in a very different light from the prescription of the Roman law. In the English and American systems, statutes of limitations furnish a sufficient defence in case of suits brought to assert title to corporeal property, absolute or usufructuary; and, wherever title is involved, and a party must prove his title affirmatively or defensively, the courts allow the possessor the benefit of a prescription analogous to the statute of limitations on the same subject, as a presumption of title.

These considerations show that care must be observed in examining the writings of continental jurists, when treating of limitations and prescription in private international law. And it is thought the result will be found to be, that the law of the *forum* is to govern when the rule is directly extinctive of remedies, whatever indirect effect it may have on proprietary rights; and that, if the rule invoked is not merely and directly extinctive or prohibitory of the remedy sought, like a statute of limitations, but is a rule applicable to the merits of the case, and part of the law directly governing rights and titles in the subject-matter of the suit, like a usucaption or prescription, then the law of the *forum* is not to govern, as such; and it becomes an independent inquiry whether a law of that character is to be drawn from the domicile, the *situs rei*, or the place of the making or executing of a contract.

Savigny, System, liv. viii. 270. Fœlix, Droit Intern. Privé, § 100. Story's Conflict of Laws, §§ 576–581. Westlake's Pr. Intern. Law, §§ 250–252. New Am. Cyclopædia, xiii. tit. Prescription. Blackstone's Comm. ii. 263.]—D.

temporarily resident. Such are the privileges and disabilities conferred by the *lex domicilii* in respect to majority and minority, marriage and divorce, sanity or lunacy, and which determine the capacity or incapacity of parties to contract, independently of the law of the place where the contract is made, or that of the place where it is sought to be enforced.

It is only those universal personal qualities, which the laws of all civilized nations concur in considering as essentially affecting the capacity to contract, which are exclusively regulated by the *lex domicilii*, and not those particular prohibitions or disabilities, which are arbitrary in their nature and founded upon local policy; such as the prohibition, in some countries, of noblemen and ecclesiastics from engaging in trade and forming commercial contracts. The qualities of a major or minor, of a married or single woman, &c., are universal personal qualities, which, with all the incidents belonging to them, are ascertained by the *lex domicilii*, but which are also everywhere recognized as forming essential ingredients in the capacity to contract.^(a)

§ 144. How far bankruptcy ought to be considered as a privilege or disability of this nature, and thus be restricted in its operation to the territory of that State under whose bankrupt code the proceedings take place, is, as already stated, a question of difficulty, in respect to which no constant and uniform usage prevails among nations.⁹³ Supposing

(a) Pardessus, Droit Commercial, Part VI. tit. 7, ch. 2, § 1.

[⁹³ *Extra-territorial Effect of Bankrupt-Laws*.—The main question as to what are termed bankrupt or insolvent laws is, whether they attempt to relieve the bankrupt ever afterwards from the obligation of his contract, or only regulate the remedies creditors may afterwards pursue to enforce contracts still legally valid and enforceable. If the latter, they belong to the laws of remedies; if the former, to the laws of contracts and of property. If a contract is made and to be executed in a certain country, it derives its character from the laws of that country, and may be dissolved by its laws. But the laws of one country cannot operate to dissolve a contract made and to be performed in another, and against parties not within its jurisdiction. This is the rule in the courts of the United States. Kent, ii. 393. Story's Conflict of Laws, Redfield's note, § 341 *a*. Baldwin v. Hale, Wallace, Sup. Ct. Rep. i. 223. Ogden v. Saunders, Wheat. xii. 213. If the laws in question can fairly be held to be merely [226] regulative of the remedies upon contracts admitted to be valid, the law of the *forum* must prevail; as each country can control the remedial processes to be pursued or permitted in its own courts. The bankrupt-laws of most countries seek to sequester and transfer to assignees all personal property wherever situated. But, in the United States, it is held, that, as such transfer is not an act of the owner in the course of business or in the exercise of his will, but an operation of municipal law, *proprio vigore*, and often *in invitum*, the law of nations does not give it an operation in foreign countries over personal property situated there, so as to transfer the title. If a foreign creditor finds, in his own country, personal property of a bankrupt, and proceeds against it to satisfy a debt which his own country does not hold to have been dissolved by the laws of the bankrupt's domicile, he can satisfy his debt in full from this property. The title of the assignee in bankruptcy will, however, be respected by comity, if the rights of no citizen entitled to proceed against the property are involved. It is matter of State policy how far a title to personal property derived from the act of law of a foreign country as part of its municipal remedial system, and not from the act of the owner, shall be respected in the country where the property is situated. The rule of reciprocity should always be favored, if it be actual and just, and is not a nominal reciprocity offered by the gaining party. If the foreign assignee in bankruptcy, claiming by act of law of his own State, seeks to get into his possession property

the bankrupt code of [226] any country to form a part of the obligation of every contract made in that country with its citizens, and that every such contract is subject to the implied condition, that the debtor may be discharged from his obligation in the manner prescribed by the bankrupt-laws, it would seem, on principle, that a certificate of discharge ought to be effectual in the tribunals of any other State where the creditor [227] may bring his suit.⁹⁴ If, on the other hand, the bankrupt code merely forms a part of the remedy for a breach of the contract, it belongs to the *lex fori*, which cannot operate extra-territorially within the jurisdiction of any other State having the exclusive right of regulating the proceedings in its own courts of justice; still less

of the bankrupt lying in another country, by aid of the courts of that country, it is a question of the policy of the country where the suit is brought, whether the assignee may sue in his own name, or shall be required to sue in that of the bankrupt; for the difference may materially affect defences and set-offs. Kent's Comm. ii. 400-408, and cases there cited. The British bankrupt-acts contemplate a transfer of the title of all property wherever situated, and of debts due to the bankrupt wherever the debtor may be; and the British courts are compelled, on principles of reciprocity, to allow validity to bankrupt titles, under foreign laws, to personal property in England, as against English creditors. Real property in England is not subject to distribution under foreign bankrupt-laws. No country is obliged to recognize a foreign bankrupt appointment as a valid transfer of lands within its own jurisdiction. Each nation is entitled to determine for itself the forms and requisites for the transfer of lands. In the United States, the separate States determine for themselves those forms and requisites. The result would seem to be, that a foreign bankrupt assignment would have no effect to transfer title in lands. If, however, the foreign assignee in bankruptcy should procure conveyances from the bankrupt in accordance with the laws of the State where the lands lie, and thus effect a transfer of them, in order to add the proceeds to the fund under his control, there would be no obstacle except direct proceedings against the land by resident creditors. In such case, their attachments of the lands to satisfy their debts would prevail over such conveyances recorded subsequently to the attachments, and over all conveyances made and recorded prior thereto, unless they be *bonâ-fide* transfers from the bankrupt to a creditor or a purchaser for a valuable consideration, such as would have been valid against the attaching creditor if there had been no bankrupt proceedings. See, on all the points embraced in this note, [227] Story's Conflict of Laws, § 403-423. Kent's Comm. ii. 392, 400-408. Ogden v. Saunders, Wheat. xii. 213. Oakley v. Bennet,⁽¹⁾ How. xi. 44. Woolsey's Intern. Law, §§ 71, 72. Belton v. Valentine, Curtis's Rep. i. 168. Booth v. Clark, How. xvii. 322. Milne v. Moreton, Binney, vi. 353. Holmes v. Remsen, Johnson, xx. 229. Blake v. Williams, Pickering, vi. 286. Merlin, Répertoire, § 1, 3, art. 10, pp. 412-416. Henry on For. Law, 127-135, 175. As to the extra-territorial effect of a discharge under proceedings in bankruptcy, see *infra*, note 94.]—D.

[⁹⁴ In the United States, the discharge of a debtor from the obligation of his contract, given by the bankrupt-law of the State of his domicile, is recognized only as to contracts made and to be performed in that State. *Supra*, note 93. In other words, such a discharge is recognized only in cases where a law affecting the contract itself, in its construction and obligation, would be recognized. A discharge in bankruptcy is held to be a proceeding judicial in its nature, and binding only on persons subject to the jurisdiction of the State, or who have voluntarily submitted themselves to it. As to debts really contracted within a State by debtors residing abroad, or debts contracted before the passage of the bankrupt-law, a foreign bankrupt discharge is no defence. Baldwin v. Hale, Wallace, Sup. Ct. Rep. i. 223. Story's Conflict of Laws, Redfield's note, § 341 a. The English rule seems not to differ from this. Potter v. Brown, East. v. 124. Smith v. Buchanan, Ib. i. 6. Shallcross v. Dyzzort,⁽¹¹⁾ Glyn & J. ii. 87. Quin v. Keefe, H. Bl. ii. 553. Lewis v. Ogden, B. & A.⁽¹¹¹⁾ iv. 654.]—D.

[¹ For Oakley v. Bennet read Oakey v. Bennett.]—G.G.W.

[¹¹ For Dyzzort read Dyzzart.]—G.G.W.

[¹¹¹ For Ogden, B. & A. read Owen, B. & Ald.]—G.G.W.

can it have such an operation where it is a mere partial modification of the remedy, such as an exemption from arrest, and imprisonment of the debtor's person on a *cessio bonorum*. Such an exemption being strictly local in its nature, and to be administered, in all its details, by the tribunals of the State creating it, cannot form a law for those of any foreign State. But if the exemption from arrest and imprisonment, instead of being merely contingent upon the failure of the debtor to perform his obligation through insolvency, enters into and forms an essential ingredient in the original contract itself, by the law of the country where it is made, it cannot be enforced in any other State by the prohibited means. Thus by the law of France, and other countries where the *contrainte par corps* is limited to commercial debts, an ordinary debt contracted in that country by its subjects cannot be enforced by means of personal arrest in any other State, although the *lex fori* may authorize imprisonment for every description of debts. (a)⁹⁵

[228] § 145. The obligation of the contract consists of the will of the parties, expressed as to its terms and conditions. Obligation of a contract.

The interpretation of these depends, of course, upon the *lex loci contractus*, as do also the nature and extent of those implied conditions which are annexed to the contract by the local law or usage. Thus the rate of interest, unless fixed by the parties, is allowed by the law as damages for the detention of the debt, and the proceedings to recover these damages may strictly be considered as a part of the remedy. The rate of interest is, however, regulated by the law of the place where the contract is made, unless, indeed, it appears that the parties had in view the law of some other country. In that case, the lawful rate of interest of the place of payment, or to which the loan has reference, by security being taken upon property there situate, will control the *lex loci contractus*. (a)

§ 146. The external form of the contract constitutes an essential part of its obligation. Form of a contract.

This must be regulated by the law of the place of contract, which determines whether it must be in writing, or under seal, or executed with certain formalities before a notary, or other public officer, and how attested. A want of compliance with these requisites renders the contract void *ab initio*; and being void by the law of the place, it cannot be carried into effect in any other State. But a mere fiscal

(a) Bosanquet & Puller's Rep. i. 131,⁽¹⁾ *Melan v. The Duke of Fitz-James*.⁽¹¹⁾

[⁹⁵ The question of the liability of the body to arrest is now considered as part of the law of remedy, and to be sought for in the law of the *forum*, both in England [228] and in America. It was formerly confounded with the question of liability to personal actions. Story's Conflict of Laws, § 571. Henry on For. Law, 81-86. Westlake, Pr. Intern. Law, § 411.]—D.

(a) Kent's Comm. on American Law, ii. 459, 5th edit. Foelix, Droit International Privé, § 85.

[¹ For 131 read 138.]—G.G.W.

[¹¹ For Fitz-James read Fitzjames.]—G.G.W.

regulation does not operate extra-territorially; and therefore the want of a stamp, required by the local law to be impressed on an instrument, cannot be objected where it is sought to be enforced in the tribunals of another country.

There is an essential difference between the form of the contract and the extrinsic evidence by which the contract is to be proved. Thus, the *lex loci contractûs* may require certain contracts to be in writing, and attested in a particular manner, and a want of compliance with these forms will render them entirely void. But if these forms are actually complied with, the extrinsic evidence, by which the existence and terms of the contract are to be proved in a foreign tribunal, is regulated by the *lex fori*.

Conclusive-
ness of
foreign
judgments
in personal
actions. [229] § 147. The most eminent public jurists concur in asserting the principle that a final judgment, rendered in a personal action, in the courts of competent jurisdiction of one State, ought to have the conclusive effect of a *res adjudicata* in every other State, wherever it is pleaded in bar of another action for the same cause. (a)

But no sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another State; and if execution be sought by suit upon the judgment, or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable. (b) The general comity, utility, and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, under certain regulations and restrictions, which differ in different countries. (c)

Law of
England. § 148. By the law of England, the judgment of a foreign tribunal, of competent jurisdiction, is conclusive where the same matter comes incidentally in controversy between the same parties; and full effect is given to the *exceptio rei judicatæ*, where it is pleaded in bar of a new suit for the same cause of action. A foreign judgment is *primâ facie* evidence where the party claiming the benefit of it applies to the English courts to enforce it; and it lies on the defendant to impeach the justice of it, or to show that it was irregularly obtained. If this is not shown, it is received as evidence of a debt, for which a new judgment is rendered in the English court, and execution awarded. But if it appears by the record of the proceedings, on which the original judgment was founded, that it was unjustly or fraudulently obtained, without actual personal notice to the party affected by it; or if it is clearly and

(a) Vattel, liv. ii. ch. 7, §§ 84, 85. Martens, Droit des Gens, §§ 93, 94, 95. Klüber, Droit des Gens, § 59. Deutsches Bundesrecht, § 366.

(b) Kent's Comm. ii. 119, 5th edit.

(c) Foelix, §§ 292-311.

unequivocally shown, by extrinsic evidence, that the judgment has manifestly proceeded upon false premises or inadequate reasons, or upon a palpable mistake of local or foreign law; it will not be enforced by the English tribunals.(a)

[230] § 149. The same jurisprudence prevails in the United States ^{American law.} of America, in respect to judgments and decrees rendered by the tribunals of a State foreign to the Union. As between the different States of the Union itself, a judgment obtained in one State has the same credit and effect in all the other States, which it has by the laws of that State where it was obtained; that is, it has the conclusive effect of a domestic judgment.(a)

§ 150. The law of France restrains the operation of foreign judgments within narrower limits. ^{Law of France.} Judgments obtained in a foreign country against French subjects are not conclusive, either where the same matter comes again incidentally in controversy, or where a direct suit is brought to enforce the judgment in the French tribunals. And this want of comity is even carried so far, that, where a French subject commences a suit in a foreign tribunal, and judgment is rendered against him, the exception of *lis finita* is not admitted as a bar to a new action by the same party, in the tribunals of his own country. If the judgment in question has been obtained against a foreigner, subject to the jurisdiction of the tribunal where it was pronounced, it is conclusive in bar of a new action in the French tribunals, between the same parties. But the party who seeks to enforce it must bring a new suit upon it, in which the judgment is *primâ facie* evidence only; the defendant being permitted to contest the merits, and to show not only that it was irregularly obtained, but that it is unjust and illegal.(a)

The execution of foreign judgments *in personam* is reciprocally allowed, by the law and usage of the different States of the Germanic Confederation, and of the European continent in general, except Spain, Portugal, Russia, Sweden, Norway, France, and the countries whose legislation is based on the French civil code.(b)

§ 151. A decree of divorce obtained in a foreign country, by a ^{Foreign divorces.} fraudulent evasion of the laws of the State to which the parties belong, would seem, on principle, to be clearly [231] void in the country of their domicile, where the marriage took place, though valid under the

(a) Knapp's Rep. in the Privy Council, i. 274, Frankland v. McGusty; Barnewall & Adolphus's Rep. ii. 757, Novelli v. Rossi; Ib. iii. ⁽¹⁾ 951, Becquet v. M'Carthy.

(a) Cranch's Rep. vii. 481-484, Mills v. Duryee. Wheaton's Rep. iii. 234, Hampton v. M'Connel.

(a) Code Civil, arts. 2123, 2128. Code de Procédure Civile, art. 546. Pardessus, Droit Commercial, Part VI. tit. 7, ch. 2, § 2, No. 1488. Merlin, Répertoire, tom. vi. tit. *Jugement*.—Questions de Droit, tom. iii. tit. *Jugement*. Toullier, Droit Civil Français, tom. x. Nos. 76-86.

(b) Foelix, Droit International Privé, §§ 293-311.

[¹ For Ib. iii. read Ib. ii.]—G.G.W.

laws of the country where the divorce was obtained. Such are divorces obtained by parties going into another country for the sole purpose of obtaining a dissolution of the nuptial contract, for causes not allowed by the laws of their own country, or where those laws do not permit a divorce *à vinculo* for any cause whatever. This subject has been thrown into almost inextricable confusion, by the contrariety of decisions between the tribunals of England and Scotland; the courts of the former refusing to recognize divorces *à vinculo* pronounced by the Scottish tribunals, between English subjects who had not acquired a *bonâ fide* permanent domicil in Scotland; whilst the Scottish courts persist in granting such divorces in cases where, by the law of England, Ireland, and the colonies connected with the United Kingdom, the authority of Parliament alone is competent to dissolve the marriage, so as to enable either party, during the lifetime of the other, again to contract lawful wedlock.(a)⁹⁶

In the most recent English decision on this subject, the House of Lords, sitting as a Court of Appeals in a case coming from Scotland, and considering itself bound to administer the law of Scotland, determined that the Scottish courts had, by the law of that country, a rightful jurisdiction to decree a divorce between parties actually domiciled in Scotland, notwithstanding the marriage was contracted in England. But the court did not decide what effect such a divorce would have, if brought directly in question in an English court of justice.(b)⁹⁷

In the United States, the rule appears to be conclusively settled that the *lex loci* of the State in which the parties are *bonâ fide* domiciled, gives jurisdiction to the local courts to decree a divorce, for any cause recognized as sufficient by the local law, without regard to the law of that State where the marriage was originally contracted.(c) This, of course, excludes such divorces as are [232] obtained in fraudulent evasion of the laws of one State, by parties removing into another for the sole purpose of procuring a divorce.(d)⁹⁸

(a) Dow's Parliamentary Cases, i. 117; Tovey *v.* Lindsay, 124. Lolly's Case. See Fergusson's Reports of Decisions in the Consistorial Courts of Scotland, *passim*.

[⁹⁶ By Act 20 & 21 Vict. 85, (¹) divorces *à vinculo* may now be granted in England by a court established for the purpose.]-D.

(b) Warrender *v.* Warrender, Bligh's Rep. ix. (¹¹) 89. S. C. Clark, & Finnelly's Rep. ii. 488.

[⁹⁷ Story's Conflict of Laws, §§ 200-227. Fergusson on Marriage and Divorce, (¹¹¹) 383-422, 283-319, 350-356. Heffter, Europ. Völker. § 37. Westlake's Pr. Intern. Law, § 350. (^{1v})]-D.

(c) Dorsey *v.* Dorsey, Chandler's Law Reporter, i. 287.

(d) Kent's Comm. ii. 107, 5th edit.

[⁹⁸ Story's Conflict of Laws, §§ 228-230 *e.* It has never been held in the United States, that a divorce can be granted in a State in which the parties have acquired a domicil, for a cause which is sufficient by the law of that State, but not sufficient by the law of the State in which the parties were domiciled at the time of the alleged act done; nor have divorces obtained

[¹ For Vict. 85 read Vict. c. 85.]-G.G.W.

[¹¹ For Rep. ix. read Rep. N. S. ix.]-G.G.W.

[¹¹¹ Insert Consistorial Reports, *after* Divorce.]-G.G.W.

[^{1v} For 350 read 353.]-G.G.W.

CHAPTER III

RIGHTS OF EQUALITY

§ 152. THE natural equality of sovereign States may be modified by positive compact, or by consent implied from constant usage, so as to entitle one State to superiority over another in respect to certain external objects such as rank, titles, and other ceremonial distinctions.

Natural equality of States modified by compact or usage.

§ 153. Thus the international law of Europe has attributed to certain States what are called *royal honors*, which are actually enjoyed by every empire or kingdom in Europe, as the Pope, the grand duchies in Germany, and the Germanic and Swiss Confederations. They were also formerly conceded to the German Empire, and to some of the great republics, such as the United Netherlands and Venice.

Royal honors.

These *royal honors* entitle the States by which they are possessed to precedence over all others who do not enjoy the same rank, with the exclusive right of sending to other States public ministers of the first rank, as ambassadors, together with certain other distinctive titles and ceremonies.^(a)

[233] § 154. Among the princes who enjoy this rank, the Catholic powers concede the precedence to the Pope, or sovereign pontiff; but Russia and the Protestant States of Europe consider him as Bishop of Rome only, and a sovereign prince in Italy, and such of them as enjoy royal honors refuse him the precedence.

Precedence among princes and States enjoying royal honors.

The Emperor of Germany, under the former constitution of the empire, was entitled to precedence over all other temporal princes, as the supposed successor of Charlemagne and of the Cæsars in the empire of the West; but since the dissolution of the late Germanic constitution, and the abdication of the titles and prerogatives of its head by the Emperor of Austria, the precedence of this sovereign over other princes of the same rank may be considered questionable.^(a)

The various contests between crowned heads for precedence are matter of curious historical research as illustrative of European manners at different periods; but the practical importance of these discussions has been greatly diminished by the progress of civilization, which no

ex parte in a State where the petitioner has acquired a domicile, been held valid when granted for an alleged cause occurring in another State, and where the party petitioned against has not actually resided in the State of the *forum*. Story's Conflict of Laws, §§ 206-230 *d.*⁽¹⁾ and cases there cited.]—D.

(a) Vattel, Droit des Gens, tom. i. liv. ii. ch. 3, § 38. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. iii.⁽¹¹⁾ ch. 2, § 129. Klüber, Droit des Gens Moderne, Part II. tit. 1, ch. 3, §§ 91, 92. Heffter, Europ. Völker. § 28.

(a) Martens, § 152.⁽¹¹¹⁾ Klüber, § 95.

[¹ For *d* read *b*.]—G.G.W.

[¹¹¹ For 152 read 132.]—G.G.W.

[¹¹ For liv. iii. read liv. iv.]—G.G.W.

longer permits the serious interests of mankind to be sacrificed to such vain pretensions.

The great
Republics.

§ 155. The text-writers commonly assigned to what were called the *great republics*, who were entitled to royal honors, a rank inferior to crowned heads of that class; and the United Netherlands, Venice, and Switzerland, certainly did formerly yield the precedence to emperors and reigning kings, though they contested it with the electors and other inferior princes entitled to royal honors. But disputes of this sort have commonly been determined by the relative power of the contending parties, rather than by any general rule derived from the form of government. Cromwell knew how to make the dignity and equality of the English Commonwealth respected by the crowned heads of Europe; and in the different treaties between the French Republic and other powers, it was expressly stipulated that the same ceremonial as to rank and etiquette should be observed between them and France which had subsisted before the revolution.(a)

Monarchs
not crowned,
and semi-
sovereigns.

[234] § 156. Those monarchical sovereigns who are not crowned heads, but who enjoy royal honors, concede the precedence on all occasions to emperors and kings.

Monarchical sovereigns who do not enjoy royal honors yield the precedence to those princes who are entitled to these honors.

Semi-sovereign or dependent States rank below sovereign States.(a)

Semi-sovereign States, and those under the protection or *Suzeraineté* of another sovereign State, necessarily rank below that State on which they are dependent. But where third parties are concerned, their relative rank must be determined by other considerations; and they may even take precedence of States completely sovereign, as was the case with the electors under the former constitution of the Germanic empire, in respect to other princes not entitled to royal honors.(b)

These different points respecting the relative rank of sovereigns and States have never been determined by any positive regulation or international compact: they rest on usage and general acquiescence. An abortive attempt was made at the Congress of Vienna to classify the different States of Europe, with a view to determine their relative rank. At the sitting of the 10th December, 1814, the plenipotentiaries of the eight powers who signed the treaty of peace at Paris, named a committee to which this subject was referred. At the sitting of the 9th February, 1815, the report of the committee which proposed to establish three classes of powers, relatively to the rank of their respective ministers, was discussed by the Congress; but doubts having arisen

(a) Treaty of Campo Formio, art. 23, and of Luneville, art. 17, with Austria. Treaties of Basle with Prussia and Spain. Schoell, *Histoire des Traités de Paix*, tom. i. p. 610, edit. Bruxelles.

(a) Klüber, § 98.

(b) Heffter, *Europ. Völker*. § 28, No. III.

respecting this classification, and especially as to the rank assigned to the great republics, the question was indefinitely postponed, and a regulation established determining merely the relative rank of the diplomatic agents of crowned heads.^(c)

§ 157. Where the rank between different States is equal or undetermined, different expedients have been resorted to for the purpose of avoiding a contest, and at the same time reserving the respective rights and pretensions of the parties. Among these is what is called the usage of the *alternat*, by which the rank and places of different powers are changed from time to [235] time, either in a certain regular order, or one determined by lot. Thus, in drawing up public treaties and conventions, it is the usage of certain powers to *alternate*, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. The regulation of the Congress of Vienna, above referred to, provides that in acts and treaties between those powers which admit the *alternat*, the order to be observed by the different ministers shall be determined by lot.^(a)

Another expedient which has frequently been adopted to avoid controversies respecting the order of signatures to treaties and other public acts, is that of signing in the order assigned by the *French* alphabet to the respective powers represented by their ministers.^(b)

§ 158. The primitive equality of nations authorizes each nation to make use of its own language in treating with others; and this right is still, in a certain degree, preserved in the practice of some States. But general convenience early suggested the use of the Latin language in the diplomatic intercourse between the different nations of Europe. Towards the end of the fifteenth century, the preponderance of Spain contributed to the general diffusion of the Castilian tongue as the ordinary medium of political correspondence. This, again, has been superseded by the language of France, which, since the age of Louis XIV., has become the almost universal diplomatic idiom of the civilized world. Those States which still retain the use of their national language in treaties and diplomatic correspondence, usually annex to the papers transmitted by them a translation in the language of the opposite party, wherever it is understood that this comity will be reciprocated. Such is the usage of the Germanic Confederation, of Spain, and the Italian courts. Those States which have a common language generally use it in their transactions with each other. Such is the case between the Germanic Confederation and its different members, and between the respective members themselves; between the different States of Italy; and between Great Britain and the United States of America.

(c) Klüber, Acten des Wiener Congresses, tom. viii. pp. 98, 102, 108, 116.

(a) Annexe xvii. à l'Acte du Congrès de Vienne, art. 7.

(b) Klüber, Uebersicht der diplomatischen Verhandlungen des Wiener Congresses, § 164.

Titles of
sovereign
princes and
States.

[236] § 159. All sovereign princes or States may assume whatever titles of dignity they think fit, and may exact from their own subjects these marks of honor. But their recognition by other States is not a matter of strict right, especially in the case of new titles of higher dignity, assumed by sovereigns. Thus the royal title of King of Prussia, which was assumed by Frederick I. in 1701, was first acknowledged by the Emperor of Germany, and subsequently by the other princes and States of Europe. It was not acknowledged by the Pope until the reign of Frederick William II. in 1786, and by the Teutonic knights until 1792, this once famous military order still retaining the shadow of its antiquated claims to the Duchy of Prussia until that period.(a) So also the title of Emperor of all the Russias, which was taken by the Czar, Peter the Great, in 1721, was successively acknowledged by Prussia, the United Netherlands, and Sweden in 1723, by Denmark in 1732, by Turkey in 1739, by the emperor and the empire in 1745-6, by France in 1745, by Spain in 1759, and by the Republic of Poland in 1764. In the recognition of this title by France, a reservation of the right of precedence claimed by that crown was insisted on, and a stipulation entered into by Russia in the form of *Reversales*, that this change of title should make no alteration in the ceremonies observed between the two courts. On the accession of the Empress Catharine II. in 1762, she refused to renew this stipulation in that form, but *declared* that the imperial title should make no change in the ceremonial observed between the two courts. This declaration was answered by the court of Versailles in a counter-declaration, renewing the recognition of that title, upon the express condition, that, if any alteration should be made by the court of St. Petersburg in the rules previously observed by the two courts as to rank and precedence, the French crown would resume its ancient style, and cease to give the title of Imperial to that of Russia.(b)

The title of Emperor, from the historical associations with which it is connected, was formerly considered the most eminent and honorable among all sovereign titles; but it was never regarded by other crowned heads as conferring, except in the single case [237] of the Emperor of Germany, any prerogative or precedence over those princes.⁹⁹

Maritime
ceremonials.

§ 160. The usage of nations has established certain maritime ceremonials to be observed, either on the ocean or those parts of the sea over which a sort of supremacy is claimed by a particular State.

Among these is the salute by striking the flag or the sails, or by

(a) Ward's History of the Law of Nations, ii. 245-248. Klüber, Droit des Gens Moderne de l'Europe, Part II. tit. 1, ch. 2, § 107, note c.

(b) Flassan, Histoire de la Diplomatie Française, tom. vi. liv. iii. pp. 328-364.

[⁹⁹ The great powers regard the assumption of royal titles as more than matter of etiquette, and as involving important relations and entailing serious consequences. They, therefore, make grave points of the recognition of such titles.]-D.

firing a certain number of guns on approaching a fleet or a ship-of-war, or entering a fortified port or harbor.

Every sovereign State has the exclusive right, in virtue of its independence and equality, to regulate the maritime ceremonial to be observed by its own vessels towards each other, or towards those of another nation, on the high seas, or within its own territorial jurisdiction. It has a similar right to regulate the ceremonial to be observed within its own exclusive jurisdiction by the vessels of all nations, as well with respect to each other, as towards its own fortresses and ships of war, and the reciprocal honors to be rendered by the latter to foreign ships. These regulations are established either by its own municipal ordinances, or by reciprocal treaties with other maritime powers.^(a)

Where the dominion claimed by the State is contested by foreign nations, as in the case of Great Britain in the narrow seas, the maritime honors to be rendered by its flag are also the subject of contention. The disputes on this subject have not unfrequently formed the motives or pretexts for war between the powers asserting these pretensions, and those by whom they were resisted. The maritime honors required by Denmark, in consequence of the supremacy claimed by that power over the Sound and Belts, at the entrance of the Baltic Sea, have been regulated and modified by different treaties with other States, and especially by the convention of the 15th of January, 1829, between Russia and Denmark, suppressing most of the formalities required by former treaties. This convention is to continue in force until a general regulation shall be established among all the maritime powers of Europe, [238] according to the protocol of the Congress of Aix-la-Chapelle, signed on the 9th November, 1818, by the terms of which it was agreed, by the ministers of the five great powers, Austria, France, Great Britain, Prussia, and Russia, that the existing regulations observed by them should be referred to the ministerial conferences at London, and that the other maritime powers should be invited to communicate their views of the subject in order to form some such general regulation.^(b)¹⁰⁰

(a) Bynkershoek, de Dominio Maris, cap. 2, 4. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. iv. ch. 4, § 159. Klüber, Droit des Gens Moderne de l'Europe, Part II. tit. 1, ch. 3, §§ 117-122.

(b) J. H. W. Schlegel,⁽¹⁾ Staats Recht des Königreichs Dänemark, Theil I. p. 412. Martens, Nouveau Recueil, tom. viii. p. 73. Ortolan, Diplomatie de la Mer, tom. i. liv. ii. ch. 15.

¹⁰⁰ This article has not been executed. On the subject of sovereign and maritime ceremonials, see also Phillimore's Intern. Law, ii. §§ 27-45. Mackintosh's Works, iii. 408.^(u) Heffter, Europ. Völker. §§ 194-197, 218. Ortolan, Règl. Intern. i. 316, 332, 345.]—D.

[¹ For J. H. W. Schlegel read J. F. W. Schlegel.]—G.G.W.

[¹¹ Mackintosh's Works, iii. 408, refers to the Case of Missionary Smith, the exercise of martial law.]—G.G.W.

CHAPTER IV

RIGHTS OF PROPERTY

National
proprietary
rights. § 161. THE exclusive right of every independent State to its territory and other property, is founded upon the title originally acquired by occupancy, conquest, or cession, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign States.

Public
and private
property. § 162. This exclusive right includes the public property or domain of the State, and those things belonging to private individuals, or bodies corporate, within its territorial limits.

Eminent
domain. § 163. The right of the State to its public property or domain is *absolute*, and excludes that of its own subjects as well as other nations. The national proprietary right, in respect to those things belonging to private individuals, or bodies corporate, within its territorial limits, is *absolute*, so far as it excludes that of other nations; but, in respect to the members of the State, it is *paramount* only, and forms what is called the *eminent domain*; (a) that is, the right, in case of necessity or for the public safety, of disposing of all the property of every kind within the limits of the State.

Prescription. § 164. The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable, as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory, or other property, for a certain length of time, by one State, excludes the claim of every other; in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and neglect, of the original defect of his title, or his intention to relinquish it. (a)¹⁰¹

(a) Vattel, *Droit des Gens*, liv. i. ch. 20, §§ 235, 244. Rutherford's *Inst. of Natural Law*, ii. ch. 9, § 6. Heffter, *Europ. Völker*. §§ 64, 69, 70.

(a) Grotius, *de Jur. Bel. ac Pac. lib. ii. cap. 4*. Puffendorf, *Jus Naturæ et Gentium*, lib. iv. cap. 12. Vattel, *Droit des Gens*, tom. i. liv. ii. ch. 11. Rutherford's *Inst. of Natural Law*, i. ch. 8; ii. ch. 9, §§ 3, 6.

'Sic qui rem suam ab alio teneri scit, nec quicquam contradicit multo tempore, is nisi causa alia manifeste appareat, non videtur id alio fecisse animo, quam quod rem illam in suarum rerum numero esse nollet.' Grotius, *in loc. cit.*

¹⁰¹ The subject of international prescription is treated at great length by Phillimore, *Intern. Law*, i. §§ 255-260. He considers Klüber and Martens as denying to prescription any place in international law, and cites against them Grotius, Heineccius, Wolff, Mably, Vattel,

[240] § 165. The title of almost all the nations of Europe to the territory now possessed by them, in that quarter of the world, was originally derived from conquest, which has been subsequently confirmed by long possession and international compacts, to which all the European States have successively become parties. Their claim to the possessions held by them in the New World, discovered by Columbus and other adventurers, and to the territories which they have acquired on the continents and islands of Africa and Asia, was originally derived from discovery, or conquest and colonization, and has since been

Conquest and discovery confirmed by compact and the lapse of time.

Bynkershoek, Rutherford, Wheaton, and Burke. The last writer (Works, ix. 449, letter to R. Burke, Esq.) calls prescription 'the soundest, the most general, the⁽¹⁾ most recognized title between man and man, that is known in municipal or public⁽¹¹⁾ jurisprudence; a title in which not arbitrary institutions, but the eternal order of things, gives judgment; a title which is not the creature, but the master, of positive law:' and says that 'all nations have always had a prescription and limitation against each other.'⁽¹¹¹⁾ Still the question discussed by Phillimore is, rather, how far and in what manner the technical rules attending prescription in private law are to be applied between nations. It cannot be seriously doubted, that long-continued firm possession, especially if practically undisputed by force, is sufficient to create sovereign title, and to give to all attempts to subvert it the character of mere rebellion, if by subjects, or of attempted conquest, if by other nations. Where a nation has lost its separate existence by conquest, but has not submitted farther than overruling force required, and regains it in a reasonable time, it is remitted to its old *status* of independence, and allowed a continuous sovereign recognition. As to what is a reasonable time in such cases, it is generally said, that the lapse of time allowed [240] for a new generation to be born and educated, and come into possession of the powers and duties of the State, furnishes the negative limit. Between nations, the question is one of degree as well as of kind; and is so complicated with lapse of time and other circumstances, that no arbitrary rule can be laid down respecting it.

The Supreme Court of the United States, in the case respecting the boundaries between Massachusetts and Rhode Island, say, 'There is no controversy in which this great principle [prescription] may be invoked^(1v) with greater justice and propriety than in a case of disputed boundary.' Howard, iv. 639.

Phillimore also applies to this subject the principles of Derivative and Extinctive Acquisition, as they exist in the Roman private law (ii.^(v) §§ 261-294); but Mr. Wheaton has not thought it necessary to pursue that course. The instances given by Phillimore, of acquisition and extinction of national dominion, form an instructive chapter of history, yet without settling any great principle beyond that summarily stated in the text. It may well be doubted if any advantage is gained by importing into the law of international prescription, terms which have become technical in private and public municipal law, like *postliminium*, *derelictio*, derivative acquisition, extinctive acquisition, &c. The effect of lapse of time doubtless rests on the same general reason in the one case as in the other; but the terms have become involved with reasons and rules peculiar to the systems creating or adopting them. The intercourse of nations is best managed by referring to those general principles applicable to what is international, and not in terms and phrases appropriated to other systems, and colored by their associations. It will be found, that, where lapse of time is invoked as a corroboration of national title, there are so many elements introduced of original right, voluntary or passive acquiescence or abandonment, or conquest *justo bello*, on the one hand; and, on the other, allegations of temporary and forced submission, with continued adverse claim, original wrong, imperfect possession, &c., with no possibility, as in civil cases, of settling the facts by a binding decision,—that each case must rest very much on its own circumstances, and must be met by the application of general principles and natural presumptions.]-D.

[¹ For general, the *read* general and the.]-G.G.W.

[¹¹ For or public *read* or in public.]-G.G.W.

[¹¹¹ This quotation reads: 'have had always a prescription, as all nations have, against each other.]-G.G.W.

[^{1v} For invoked *read* involved.]-G.G.W.

[^v For ii. *read* i.]-G.G.W.

confirmed in the same manner, by positive compact. Independently of these sources of title, the general consent of mankind has established the principle, that long and uninterrupted possession by one nation excludes the claim of every other. Whether this general consent be considered as an implied contract, or as positive law, all nations are equally bound by it; since all are parties to it; [241] since none can safely disregard it without impugning its own title to its possessions; and since it is founded upon mutual utility, and tends to promote the general welfare of mankind.

The Papal
Bull of 1493.

§ 166. The Spaniards and Portuguese took the lead among the nations of Europe, in the splendid maritime discoveries in the East and the West, during the fifteenth and sixteenth centuries. According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors, and as between the Christian powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims. Hence the famous bull, issued by Pope Alexander VI., in 1493, by which he granted to the united crowns of Castile and Arragon all lands discovered, and to be discovered, beyond a line drawn from pole to pole, one hundred leagues west from the Azores, or Western Islands, under which Spain has since claimed to exclude all other European nations from the possession and use, not only of the lands but of the seas in the New World west of that line. Independent of this papal grant, the right of prior discovery was the foundation upon which the different European nations, by whom conquests and settlements were successively made on the American continent, rested their respective claims to appropriate its territory to the exclusive use of each nation. Even Spain did not found her pretension solely on the papal grant. Portugal asserted a title derived from discovery and conquest to a portion of South America; taking care to keep to the eastward of the line traced by the Pope, by which the globe seemed to be divided between these two great monarchies. On the other hand, Great Britain, France, and Holland, disregarded the pretended authority of the Papal See, and pushed their discoveries, conquests, and settlements, both in the East and West Indies; until conflicting with the paramount claims of Spain and Portugal, they produced bloody and destructive wars between the different maritime powers of Europe. But there was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions. Thus the bull of Pope Alexander VI. reserved from the grant to Spain all lands which had been previously occupied by any other *Christian* nation; and the patent granted by Henry VII. of England to John Cabot and his sons, authorized them 'to seek out and discover all islands, regions, and provinces [242] whatsoever, that may belong to heathens and infidels;' and 'to subdue, occupy,

and possess these territories, as his vassals and lieutenants.' In the same manner, the grant from Queen Elizabeth to Sir Humphrey⁽¹⁾ Gilbert empowers him to 'discover such remote heathen and barbarous lands, countries, and territories, not actually possessed by any Christian prince or people, and to hold, occupy, and enjoy the same, with all their commodities, jurisdictions, and royalties.' It thus became a maxim of policy and of law, that the right of the native Indians was subordinate to that of the first Christian discoverer, whose paramount claim excluded that of every other civilized nation, and gradually extinguished that of the natives. In the various wars, treaties, and negotiations, to which the conflicting pretensions of the different States of Christendom to territory on the American continents have given rise, the primitive title of the Indians has been entirely overlooked, or left to be disposed of by the States within whose limits they happened to fall, by the stipulations of the treaties between the different European powers. Their title has thus been almost entirely extinguished by force of arms, or by voluntary compact, as the progress of cultivation gradually compelled the savage tenant of the forest to yield to the superior power and skill of his civilized invader.^(a)¹⁰²

§ 167. In the dispute which took place in 1790, between Great Britain and Spain, relative to Nootka Sound, the latter claimed all the north-western coast of America as far north as Prince William's Sound, in latitude 61°, upon the ground of prior discovery and long possession, confirmed by the eighth article of the treaty of Utrecht, referring to the state of possession in the time of His Catholic Majesty Charles II. This claim was contested by the British government, upon the principle that the earth is the common inheritance of mankind, of which each individual and each nation has a right to appropriate a share, by occupation and cultivation. This dispute was terminated by a convention between the two powers, stipulating that their respective subjects should not be disturbed in their navigation and fisheries in the Pacific Ocean or the South Seas, or in landing on the coasts of those seas, not already occupied, for the purpose of carrying on their commerce with the natives of the coun[243]try, or of making settlements there, subject to the following provisions:—

Dispute between Great Britain and Spain, relating to Nootka Sound.

1. That the British navigation and fishery should not be made the pretext for illicit trade with the Spanish settlements; and that British subjects should not navigate or fish within the space of ten marine leagues from any part of the coasts already occupied by Spain.

2. That in all parts of the north-western coasts of North America, or of the islands adjacent, situated to the north of the parts of the said

(a) Wheaton's Rep. viii. 571-605, *Johnson v. M'Intosh*.

[¹⁰² See note 24, *suprà*, on Indian Titles.]—D.

[¹ For Humphrey read Humphrey.]—G.G.W.

coast already occupied by Spain, wherever the subjects of either of the two powers should have made settlements since the month of April, 1789, or should thereafter make any, the subjects of the other should have free access, and should carry on their trade without any disturbance or molestation.

3. That, with respect to the eastern and western coasts of South America, and the adjacent islands, no settlement should be formed thereafter, by the respective subjects, in such parts of those coasts as are situated to the south of those parts of the same coasts, and of the adjacent islands already occupied by Spain; provided that the respective subjects should retain the liberty of landing on the coasts and islands so situated, for the purposes of their fishery, and of erecting huts and other temporary buildings, for those purposes only.^(a)

Controversy
between the
United
States and
Russia,
respecting
the north-
western
coast of
America.

§ 168. By an ukase of the Emperor Alexander of Russia, of the 4-16th September, 1821, an exclusive territorial right on the north-west coast of America was asserted as belonging to the Russian Empire, from Behring's Straits to the 51st degree of north latitude, and in the Aleutian Islands, on the east coast of Siberia, and the Kurile Islands, from the same straits to the South Cape in the island of Oorooop, in 45° 51' north latitude. The navigation and fishery of all other nations were prohibited in the islands, ports, and gulfs, within the above limits; and every foreign vessel was forbidden to touch at any of the Russian establishments above enumerated, or even to approach them, within a less distance than 100 Italian miles, under penalty of confiscation of [244] the cargo. The proprietary rights of Russia to the extent of the north-west coast of America, specified in this decree, were rested upon the three bases said to be required by the general law of nations and immemorial usage; that is,—upon the title of first discovery; upon the title of first occupation; and, in the last place, upon that which results from a peaceable and uncontested possession of more than half a century. It was added, that the extent of sea, of which the Russian possessions on the continents of Asia and America form the limits, comprehended all the conditions which were ordinarily attached to shut seas (*mers fermées*); and the Russian government might consequently deem itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, by measures adapted to prevent contraband trade within the chartered limits of the American Russian Company.

All these grounds were contested, in point of fact as well as right, by the American government. The Secretary of State, Mr. John Q.

(a) Annual Register for 1790, (State Papers,) pp. 285-305; 1791, pp. 208, 214,⁽¹⁾ 222-227. Greenhow, History of Oregon and California, 466, Proofs and Illustrations, K. No. 1.

[¹ For 214 read 211.]—G.G.W.

Adams, in his reply to the communication of the Russian Minister at Washington, stated, that from the period of the existence of the United States as an independent nation, their vessels had freely navigated these seas, and the right to navigate them was a part of that independence; as was also the right of their citizens to trade, even in arms and munitions of war, with the aboriginal natives of the north-west coast of America, who were not under the territorial jurisdiction of other nations. He totally denied the Russian claim to any part of America south of the 55th degree of north latitude, on the ground that this parallel was declared, in the charter of the Russian American Company, to be the southern limit of the discoveries made by the Russians in 1799; since which period they had made no discoveries or establishments south of that line, on the coast claimed by them. With regard to the suggestion, that the Russian government might justly exercise sovereignty over the northern Pacific Ocean, as *mare clausum*, because it claimed territories both on the Asiatic and American coasts of that ocean, Mr. Adams merely observed, that the distance between those coasts on the parallel of 51 degrees, was not less than *four thousand miles*; and he concluded by expressing the persuasion of the American government, that the citizens of the United States would remain unmolested in the prosecution of their lawful commerce, and that no effect would be given to a prohibition, manifestly incompatible with their rights. (a)

§ 169. The negotiations on this subject were finally terminated by a convention between the two governments, signed at Petersburg, on the 5-17th April, 1824, containing the following stipulations:—

Convention
of 1824,
between the
United
States and
Russia.

‘ART. 1. It is agreed, that, in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the high contracting powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles:

‘ART. 2. With the view of preventing the rights of navigation and of fishing, exercised upon the Great Ocean by the citizens and subjects of the high contracting powers, from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment, without the permission of the governor or commander; and that, reciprocally, the subjects of Russia shall not resort, without permission, to any establishment of the United States upon the North West coast.

‘ART. 3. It is moreover agreed, that, hereafter, there shall not be

(a) Annual Register, lxiv. 576-584: Correspondence between Mr. John Q. Adams and M. Poletica.

formed by the citizens of the United States, or under the authority of the said States, any establishment upon the North West coast of America, nor in any of the islands adjacent, *to the north* of fifty-four degrees and forty minutes of north latitude; and that, in the same manner, there shall be none formed by Russian subjects, or under the authority of Russia, *south* of the same parallel.

‘ART. 4. It is, nevertheless, understood, that, during a term of ten years, counting from the signature of the present convention, the ships of both powers, or which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hinderance whatever, the interior seas, gulphs, harbours, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country.’

Convention
of 1825
between
Great Brit-
ain and
Russia.

[246] § 170. Great Britain had also formally protested against the claims and principles set forth in the Russian ukase of 1821, immediately on its promulgation, and subsequently at the Congress of Verona. The controversy, as between the British and Russian governments, was finally closed by a convention signed at Petersburg, February 16–28, 1825, which also established a permanent boundary between the territories respectively claimed by them on the continent and islands of North-western America.

This treaty contained the following stipulations:—

‘ART. 1. It is agreed that the respective Subjects of The High Contracting Parties shall not be troubled or molested, in any part of the Ocean commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such Part⁽¹⁾ of the Coast as shall not have been already occupied, in order to trade with the Natives, under the restrictions and conditions specified in the following Articles:—

‘ART. 2. In order to prevent the Right of navigating and fishing exercised upon the Ocean by the Subjects of The High Contracting Parties, from becoming the pretext for an illicit Commerce, it is agreed that the Subjects of His Britannick Majesty shall not land at any place where there may be a Russian Establishment, without the permission of the Governor or Commandant; and, on the other hand, that Russian Subjects shall not land, without permission, at any British Establishment on the North-West Coast.’

By the 3d and 4th articles it was agreed that ‘the Line of demarcation between the Possessions of the High Contracting Parties, upon the Coast of the Continent, and the Islands of America to the North-West,’ should be drawn from the southernmost point of Prince of Wales’s Island, in latitude 54 degrees 40 minutes eastward, to the great inlet in the continent called Portland Channel, and along the middle

[¹ For Part read Parts.]—G.G.W.

of that inlet to the 56th degree of latitude, whence it should follow the summit of the mountains bordering the coast, within ten leagues north-westward, to Mount St. Elias, and thence north, in the course of the 141st meridian west from Greenwich, to the Frozen Ocean, 'ⁱwhich line shall form the limit between the Russian and the'ⁱⁱ British Possessions in'ⁱⁱⁱ the Continent of America to the North-West.'

'ART. 5. It is moreover agreed, that no Establishment shall be formed by either of the Two Parties within the limits assigned by [247] the two preceding Articles to the Possessions of the Other: consequently, British Subjects shall not form any Establishment either upon the Coast, or upon the border of the Continent comprised within the limits of the Russian Possessions, as designated in the two preceding Articles; and, in like manner, no Establishment shall be formed by Russian Subjects beyond the said limits.

'ART. 6. It is understood that the Subjects of His Britannick Majesty, from whatever Quarter they may arrive, whether from the Ocean, or from the interior of the Continent, shall for ever enjoy the right of navigating freely, and without any hinderance whatever, all the rivers and streams which, in their course towards the Pacific Ocean may cross the line of demarcation upon the line of Coast described in Article 3 of the present Convention.

'ART. 7. It is also understood, that, for the space of ten Years from the signature of the present Convention, the vessels of the Two Powers, or those belonging to Their respective Subjects, shall mutually be at liberty to frequent, without any hinderance whatever, all the inland Seas, Gulfs, '^{iv}Havens, and Creeks on the Coast mentioned in Article 3, for the purpose'^v of fishing and trading with the Natives.

'ART. 8. The Port of Sitka, or Novo Archangelsk, shall be open to the Commerce and Vessels of British Subjects for the space of ten Years from the date of the exchange of the Ratifications of the present Convention. In the event of an extension of this term being'^{vi} granted to any other Power, the like extension shall be granted also to Great Britain.

'ART. 9. The above-mentioned liberty of Commerce shall not apply to the trade in spirituous liquors, in fire-arms, or other arms, gunpowder or other warlike stores; the High Contracting Parties reciprocally engaging not to permit the above-mentioned articles to be sold or delivered, in any manner whatever, to the Natives of the Country.'

The 10th and 11th articles contain regulations respecting British or Russian vessels, navigating the Pacific Ocean, and putting into the

[ⁱ Transfer quotation mark from which to shall.]—G.G.W. [ⁱⁱ Omit the.]—G.G.W.

[ⁱⁱⁱ For in read on.]—G.G.W. [^{iv} For Seas, Gulfs read Seas, the Gulfs.]—G.G.W.

[^v For purpose read purposes.]—G.G.W.

[^{vi} For term being read term of ten years being.]—G.G.W.

ports of the respective parties in distress; and for the settlement of all cases of complaint arising under the treaty. (a)

Expiration of the Convention of 1824 between the United States and Russia. [248] § 171. In the mean time, the period of ten years, established by the 4th article of the Convention between the United States and Russia, during which the vessels of both nations might frequent the bays, creeks, harbors, and other interior waters on the north-western coast of America, had expired. The Russian government had chosen to consider that article as the only limitation of its right to exclude American vessels from all parts of the division of the coast, on which the United States stipulated to form no establishments; disregarding entirely the first article of the Convention, by which all unoccupied places on the north-western coast were declared free and open to the citizens or subjects of both parties—American vessels were consequently prohibited by the Russian authorities from trading on the unoccupied parts of that coast, north of the parallel of 54th degree 40 minutes. The American government protested against this prohibition, and at the same time, proposed to the Russian government to renew the stipulations of the Convention of 1824, for an indefinite period of time.(a)

In the letter of instructions from the Secretary of State, Mr. Forsyth, to the American Minister at Petersburg, it was stated that if the 4th article was to be considered as merely applicable to parts of the coast unoccupied, then it merely provided for the temporary enjoyment of a privilege which existed in perpetuity, under the law of nations, and which had been expressly declared so to exist by a previous article of the Convention. Containing, therefore, no provision not embraced in the preceding article, it would be useless and of no effect. But the rule in regard to the construction of an instrument, of whatever kind, was, that it should be so construed, if possible, as that every part may stand.

If the article were construed to include points of the coast already occupied, it then took effect, thus far, as a temporary exception to a perpetual prohibition, and the only consequence of the expiration of the term to which it was limited, would be the immediate and continued operation of the prohibition.

It was still more reasonable to understand it, however, as intended to grant permission to enter interior bays, &c., at the mouths of which there might be establishments, or the shores of which might be, in part, but not wholly, occupied by such establishments, thus providing for a case which would otherwise admit of doubt, as without the 4th article it would be questionable whether the bays, &c., described in it belonged to the first or second article.

(a) Greenhow, *History of Oregon and California*, 469; *Proofs and Illustrations*, I. No. 5.

(a) Greenhow, 343-361.

In no sense could it be understood as implying an acknowledgment, on the part of the United States, of the right of Russia to the possession of the coast above the latitude of 54 degrees 40 minutes north. It must be taken in connection with the other articles of the Convention, which had, in fact, no reference whatever to the question of the right of possession of the unoccupied part of the coast. In a spirit of compromise, and to prevent future collisions or difficulties, it was agreed that no new establishments should be formed by the respective parties to the north or south of a certain parallel of latitude, after the conclusion of the agreement; but the question of the right of possession beyond the existing establishments, as it subsisted previously to, or at the time of the conclusion of the Convention, was left untouched. The United States, in agreeing not to form new establishments to the north of latitude 54 degrees 40 minutes north, made no acknowledgment of the right of Russia to the territory above that line. If such an admission had been made, Russia, by the same construction of the article, must have acknowledged the right of the United States to the territory south of the designated line. But that Russia did not so understand the article, was conclusively proved by her having entered into a similar agreement in a subsequent treaty (1825) with Great Britain; and having, in fact, acknowledged in that instrument the right of the same territory by Great Britain. The United States could only be considered as acknowledging the right of Russia to acquire, by actual occupation, a just claim to unoccupied lands above the latitude 54 degrees 40 minutes north; and even this was mere matter of inference as the Convention of 1824 contains nothing more than a negation of the right of the United States to occupy new points within that limit.

Admitting that this inference was just, and was in contemplation of the parties to the Convention, it would not follow that the United States ever intended to abandon the just right acknowledged by the first article to belong to them under the law of nations, *i.e.* to frequent any part of the unoccupied coasts of North America, for the purpose of fishing or trading with the natives. [250] All that the Convention admitted was an inference of the right of Russia to acquire possession by settlement north of 54 degrees 40 minutes north. Until that actual possession was taken, the first article of the Convention acknowledged the right of the United States to fish and trade as prior to its negotiation. This was not only the just construction, but it was the one both parties were interested in putting upon the instrument, as the benefits were equal and mutual, and the object of the Convention, to avoid converting the exercise of the common right into a dispute about exclusive privilege, was secured by it.

These arguments were not controverted by the Russian cabinet, which, however, declined the proposition for a renewal of the

engagements contained in the 4th article; and the matter still rests on the same footing.^(b)

Claim of
the United
States to the
Oregon ter-
ritory.

§ 172. The claim of the United States to the territory between the Rocky Mountains and the Pacific Ocean, and between the 42d degree and the 54th degree and 40 minutes of north latitude, is rested by them upon the following grounds:—

1. The first discovery of the mouth of the river Columbia by Captain Gray, of Boston, in 1792; the first discovery of the sources of that river, and the exploration of its course to the sea by Captains Lewis and Clark, in 1805-6; and the establishment of the first posts and settlements in the territory in question by citizens of the United States.

2. The virtual recognition by the British government of the title of the United States in the restitution of the settlement of Astoria or Fort George, at the mouth of the Columbia River, which had been captured by the British during the late war between the two countries, and which was restored in virtue of the 1st article of the treaty of Ghent, 1814, stipulating that 'all territory, places, and possessions whatever,⁽¹⁾ taken by either party from the other during the war,' &c., 'shall be restored without delay.' This restitution was made, without any reservation or exception whatsoever, communicated at the time to the American government.

3. The acquisition by the United States of all the titles of Spain, which titles were derived from the discovery of the coasts [251] of the region in question, by Spanish subjects, before they had been seen by the people of any other civilized nation. By the 3d article of the treaty of 1819, between the United States and Spain, the boundary line between the two countries, west of the Mississippi, was established from the mouth of the river Sabine, to certain points on the Red River and the Arkansas, and running along the parallel of 42 degrees north of the South Sea; His Catholic Majesty ceding to the United States 'all his rights, claims, and pretensions, to any territories east and north of the said line; and' renouncing 'for himself, his heirs and successors,⁽¹¹⁾ all claim to the said territories for ever.' The boundary thus agreed on with Spain was confirmed by the treaty of 1828, between the United States and Mexico, which had, in the mean time, become independent of Spain.

4. Upon the ground of *contiguity*, which should give to the United States a stronger right to those territories than could be advanced by any other power. 'If,' said Mr. Gallatin, 'a few trading factories on the

(b) Mr. Forsyth's letter to Mr. Dallas, Nov. 3, 1837: Cong. Doc. Sess. 1838-9, i. 36. Greenhow, 361-363.

[¹ For whatever read whatsoever.]—G.G.W.

[¹¹ The treaty reads: 'and for himself, his heirs, and successors, renounces'.]—G.G.W.

shores of Hudson's Bay have been considered by Great Britain as giving an exclusive right of occupancy as far as the Rocky Mountains; if the infant settlements on the more southern Atlantic shores justified a claim thence to the South Seas, and which was actually enforced to the Mississippi; that of the millions of American citizens already within reach of those seas, cannot consistently be rejected. It will not be denied that the extent of contiguous country to which an actual settlement gives a prior right, must depend, in a considerable degree, on the magnitude and population of that settlement, and on the facility with which the vacant adjacent land may, within a short time, be occupied, settled, and cultivated by such population, compared with the probability of its being occupied and settled from any other quarter. This doctrine was admitted to its fullest extent by Great Britain, as appeared by all her charters, extending from the Atlantic to the Pacific, given to colonies established then only on the borders of the Atlantic. How much more natural and stronger the claim, when made by a nation whose population extended to the central parts of the continent, and whose dominions were by all acknowledged to extend to the Rocky Mountains.^{'<i>}

The exclusive claim of the United States is opposed by Great Britain on the following grounds:—

[252] § 173. 1. That the Columbia was not discovered by Gray, who had only entered its mouth, discovered four years previously by Lieutenant Meares of the British navy; and that the exploration of the interior borders of the Columbia by Lewis and Clark could not be considered as confirming the claim of the United States, because, if not before, at least in the same and subsequent years, the British Northwest Company had, by means of their agents, already established their posts on the head waters or main branch of the river.

British claims to the Oregon Territory.

2. That the restitution of Astoria, in 1818, was accompanied by express reservations of the claim of Great Britain to that territory, upon which the American settlement must be considered an encroachment.

3. That the titles to the territory in question, derived by the United States from Spain through the treaty of 1819, amounted to nothing more than the rights secured to Spain equally with Great Britain by the Nootka Sound Convention of 1790: namely, to settle on any part of those countries, to navigate and fish in their waters, and to trade with the natives.

4. That the charters granted by British sovereigns to colonies on the Atlantic coasts were nothing more than cessions to the grantees of whatever rights the grantor might consider himself to possess, and could not be considered as binding the subjects of any other nation,

[¹ This paragraph is a quotation from Sen. Doc. No. 174, 26th Cong. 1st sess., p. 185.]—G.G.W.

or as part of the law of nations, until they had been confirmed by treaties.

Negotiations
of 1827.

§ 174. During the negotiation of 1827, the British plenipotentiaries, Messrs. Huskisson and Addington, presented the pretensions of their government in respect to the territory in question in a statement, of which the following is a summary.

‘Great Britain claims no exclusive sovereignty over any portion of the territory on the Pacific, between the 42d and the 49th parallels of latitude. Her present claim, not in respect to any part, but to the whole, is limited to a right of joint occupancy, in common with other States, leaving the right of exclusive dominion in *abeyance*; and her pretensions tend to the mere maintenance of her own rights, in resistance to the exclusive character of the pretensions of the United States.

‘The rights of Great Britain are recorded and defined in the Convention of 1790. They embrace the right to navigate the waters of those countries, to settle in and over any part of them, [253] and to trade with the inhabitants and occupiers of the same. These rights have been peaceably exercised ever since the date of that Convention; that is, for a period of nearly forty years. Under that Convention, valuable British interests have grown up in those countries. It is admitted that the United States possess the same rights, although they have been exercised by them only in a single instance, and have not, since the year 1813, been exercised at all; but beyond those rights they possess none.

‘In the interior of the territory in question, the subjects of Great Britain have had, for many years, numerous settlements and trading-posts; several of these posts are on the tributary waters⁽¹⁾ of the Columbia; several upon the Columbia itself; some to the northward, and others to the southward of that river. And they navigate the Columbia as the sole channel for the conveyance of their produce to the British stations nearest to the sea, and for its shipment thence⁽¹¹⁾ to Great Britain; it is also by the Columbia and its tributary streams that these posts and settlements receive⁽¹¹¹⁾ their annual supplies from Great Britain.

‘To the interests and establishments which British industry and enterprise have created, Great Britain owes protection; that protection will be given, both as regards settlement, and freedom of trade and navigation, with every attention not to infringe the co-ordinate rights of the United States; it being the desire of the British government, so long as the joint occupancy continues, to regulate its own obligations

[¹ For waters *read* streams.]—G.G.W.

[¹¹ For for its shipment thence *read* for the shipment of it from thence.]—G.G.W.

[¹¹¹ For receive *read* received.]—G.G.W.

by the same rules which govern the obligations of every other occupying party.'^(a)

§ 175. By the 3d article of the Convention between the United States and Great Britain, in 1818, it was 'agreed, that any country that may be claimed by either party, on the northwest coast of America, westward of the Stony Mountains, shall, together with its harbors, bays, and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date of the signature of the present Convention, to the vessels, citizens, and subjects of the two powers; it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the [254] claims of any other power or state to any part of the said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences amongst themselves.'

In 1827, another Convention was concluded between the two parties, by which it was agreed:—

'ART. 1. All the provisions of the third article of the Convention concluded between the United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland, on the 20th of October, 1818, shall be, and they are, hereby, further indefinitely extended and continued in force, in the same manner as if all the provisions of the said article were herein specifically recited.

'ART. 2. It shall be competent, however, to either of the contracting parties, in case either should think fit at any time after the 20th of October, 1828, on giving due notice of twelve months to the other contracting party, to annul and abrogate this Convention; and it shall, in such case, be accordingly entirely annulled and abrogated, after the expiration of the said term of notice.

'ART. 3. Nothing contained in this Convention, or in the third article of the Convention of the 20th of October, 1818, hereby continued in force, shall be construed to impair, or in any manner affect the claims which either of the contracting parties may have to any part of the country westward of the Stony or Rocky Mountains.'^(a)

§ 176. The notification provided for by the Convention having been given by the American government, new discussions took place between the two governments, which were terminated by a treaty concluded at Washington, in 1846.¹⁰³ By the first article of that treaty it was stipulated, that from the point on the 49th parallel of north latitude, where the boundary laid down in existing treaties and

(a) Congress. Documents, 20th Cong. and 1st Sess. No. 199. Greenhow, Proofs and Illustrations, H. <1>

(a) Elliot's American Diplomatic Code, i. 282, 330.

[¹⁰³ U. S. Laws and Treaties, ix. 109, 869.]—D.

[¹ For this statement see Sen. Doc. No. 174, 26th Cong. 1st sess., p. 187.]—G.G.W.

conventions between the United States and Great Britain terminates, the line of boundary shall be continued westward along the said 49th parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel, and of Fucas Straits, to the Pacific Ocean; provided, however, that the navigation of the whole of the said channel and straits, south of the 49th parallel of north latitude, remain free [255] and open to both parties. The second article stipulated for the free navigation of the Columbia River by the Hudson's Bay Company, and the British subjects trading with them, from the 49th degree of north latitude to the ocean. The third article provided that the possessory rights of the Hudson's Bay Company, and of all other British subjects, to the territory south of the parallel of the 49th degree of north latitude, should be respected.¹⁰⁴

Maritime
territorial
jurisdiction.

§ 177. The maritime territory of every State extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the State.¹⁰⁵ Within these limits, its rights of

[¹⁰⁴ *Guano Islands*.—In 1856, the United States adopted a general system respecting the discovery and use of guano islands, set forth in the Act of Congress, of 18th August, 1856. (U. S. Laws, xi. 119.) Its provisions are applicable only to 'discoveries' that had been made or might thereafter be made, and 'peaceful possession' taken, of 'deposits of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government.' It provides that citizens of the United States, discovering and taking peaceful possession of such deposits, shall be protected by the government in the use of the same for the purpose of removing guano; but it requires them to sell or ship the guano to citizens of the United States only, and at rates fixed by statute. It extends over these places the criminal and penal laws of the United States applicable to vessels of the United States at sea. It provides that nothing in the act shall be construed as obligatory on the United States to retain possession of such places after the guano shall have been removed. In fact, it secures to citizens the usufruct of unoccupied guano deposits which they have discovered and peacefully occupied, beyond the jurisdiction of any foreign State, upon certain terms as to the sale and exportation of the guano; and stipulates for nothing beyond the usufruct while the guano remains. Under this act, the United States had questions with Venezuela as to Aves Rock, and with Hayti as to Navaza,—islands lying off the coasts of those countries respectively. The former was settled by a payment of an indemnity by Venezuela. Ex. Doc. No. 25, 34th Cong. 3d. Sess.; and No. 37, 36th Cong. 1st Sess.]—D.

[¹⁰⁵ *Territorial Waters*.—Grotius extends territorial rights over as much of the sea as can be defended from the shore. Lib. ii. cap. 3, §§ 13, 14. The argument is, that the limit of exclusive jurisdiction should be the limit of the power of regular and effective instruments of war, used on and from the lands and territorial possessions of a nation. Hautefeuille adheres to the rule of the cannon-shot; but contends, that, in case of small bays and gulfs, the line from which the cannon-shot should be measured is a line drawn from headland to headland. He does not, however, contend for such a line in case of bays so large as to be parts of a public ocean. (Droits des Nat. Neutr. i. 89, 239.) Bynkershoek defines the limits thus: 'Terræ potestas finitur, ubi [256] finitur armorum vis, . . . quousque tormenta exploduntur.'¹ De Dominio Maris, cap. 2. Of the same opinion are Vattel (liv. i. ch. 23, § 289), Azuni (t. i. cap. 2, § 14), Klüber (§ 130);

[¹ This quotation from Bynkershoek should read: *Loquor . . . potestatem terræ finire, ubi finitur armorum vis, . . . quousque tormenta . . . exploduntur.*]—G. G. W.

property and territorial jurisdiction are absolute, and exclude those of every other nation. (a)

§ 178. The term 'coasts' includes the natural appendages of the territory which rise out of the water, although these islands are not of sufficient firmness to be inhabited or fortified; but it does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water. The rule of law on this subject is *Terræ dominium finitur, ubi finitur armorum vis*; and since the introduction of fire-arms, that distance has usually been recognized to be about three miles from the shore. (a)¹⁰⁶ In a case before [257] Sir W. Scott, (Lord Stowell,) respecting the legality of a capture alleged to be made within the neutral territory of the United States, at the mouth of the river Mississippi, a question arose as to what was to be deemed the shore, since there are a number of little mud islands, composed of earth and trees, drifted down by the river, which form a kind of portico to the main land. It was contended that these were not to be considered as any part of the American territory—that they were a sort of 'no man's land,' not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. It was argued that the line of territory was to be taken only from the Balize, which is a fort raised on made land by the former Spanish

Extent of
the term
coasts or
shore.

and De Martens (*Droit des Gens*, § 40.) Rayneval limits it to the horizon,—an impracticable test. (*Instit. liv. ii. ch. 9, § 10.*) Valin contends for a line beyond soundings, 'où l'on ne peut pas trouver le fond.' (*Comm. sur l'Ordonnance de 1681, liv. v. tit. 1.*) But soundings are now had at great depths, and in many parts of mid-ocean; and there are great irregularities in soundings, and differences in coasts in respect of shallowness. Ortolan treats this subject at great length, and comes to the conclusion that the limit (for which he adopts the phrase of Pinheiro Ferreira, *ligne de respect*) should be the extent to which projectiles of war can be effectively thrown from the shore, although that must be an advancing line in the improvements made by modern science. (*Règl. Intern. i. ch. 8, p. 152-158, edit. of 1864.*) Heffter (*Europ. Völker. § 75*) adopts the same reasoning, and considers the cannon-shot as the test; and that the treaties which fix upon three miles, and formerly fixed upon two miles, as the limits, are intended to define the range of artillery. See also Riquelme, *Derecho Pub. Intern. i. 253.*⁽¹⁾ Jacobson's *Sea Laws*, 586-590. Tellegen, 50. Halleck's *Intern. Law*, 130. Emerigon, *Des Assurances*, ch. 12, § 19. De Cussy, *Droit Marit. liv. i. tit. 2, § 40.* Wildman's *Intern. Law*, i. 70. The treaties between England and the United States of 1818, and between England and France of 2d August, 1839, settle the limits of exclusive fishery at three marine miles. The English act, 1833, assumes the marine league as the limit of jurisdiction over the open sea.]—D.

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 3, § 10. Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 8.* De Dominio Maris, cap. 2. Vattel, liv. i. ch. 23, § 289. Valin, *Comm. sur l'Ordonnance de la Marine*, liv. v. tit. 1. Azuni, *Diritto Marit.*, Pt. I. cap. 2, art. 3, § 15. Galiani, *dei Doveri dei Principi Neutrali in Tempo di Guerra*, liv. i. Life and Works of Sir L. Jenkins, vol. ii. 780.

(a) Unde dominium maris proximi non ultra concedimus, quàm e terrâ illi imperari potest, et tamen eò usque; nulla siquidem sit ratio, cur mare, quod in alicujus imperio est et potestate, minus ejusdem esse dicamus, quàm fossam in ejus territorio. . . . Quare omnino videtur rectius, eò potestatem terræ extendi, quousque tormenta exploduntur, eatenus quippe cum imperare, tum possidere videtur. Loquor autem de his temporibus, quibus illis machinis utimur: alioquin generaliter dicendum esset, potestatem terræ finiri, ubi finitur armorum vis; etenim hæc, ut diximus, possessionem tuetur. Bynkershoek, de Dominio Maris, cap. 2. Ortolan, *Diplomatie de la Mer*, liv. ii. ch. 8.

[¹⁰⁶ See note No. 105, ante.]—D.

[1 For 253 read 213.]—G.G.W.

possessors. But the learned judge was of a different opinion, and determined that the protection of the territory was to be reckoned from these islands, and that they are the natural appendages of the coast on which they border, and from which, indeed, they were formed. Their elements were derived immediately from the territory; and, on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, et vicino prædio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Whether they were composed of earth or solid rock would not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.^(b)¹⁰⁷

The King's
Chambers.

§ 179. The exclusive territorial jurisdiction of the British crown over the inclosed parts of the sea along the coasts of the island of Great Britain, has immemorially extended to those bays called the *King's Chambers*; that is, portions of the sea cut off by lines drawn from one promontory to another. A similar jurisdiction is also asserted by the United States over the Delaware Bay, and other bays and estuaries forming portions of their territory. It appears from Sir Leoline Jenkins, that both in the reigns of James I. and Charles II. the security of British commerce was provided for, by express prohibitions against the [258] roving or hovering of foreign ships of war so near the neutral coasts and harbors of Great Britain as to disturb or threaten vessels homeward or outward bound; and that captures by such foreign cruisers, even of their enemies' vessels, would be restored by the Court of Admiralty, if made within the King's Chambers. So, also, the British 'Hovering Act,' passed in 1736, (9 Geo. II. cap. 35.) assumes, for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transhipped within that distance, without payment of duties. A similar provision is contained in the revenue laws of the United States; and both these provisions have been declared, by judicial authority in each country, to be consistent with the law and usage of nations.^(a)¹⁰⁸

(b) Robinson's Adm. Rep. v. 385, (c.) The Anna.

[¹⁰⁷ See also Halleck's Intern. Law, 130. Wildman's Intern. Law, i. 39. Ortolan, *Domaine Intern.* § 93. De Pistoye et Duverdy, *Traité des Prises*, tit. 2, ch. 1, § 1. Islands adjacent to the coast of the main land, though not formed from it by alluvium or increment, are considered as *appurtenant*, unless some other power has obtained title to them by some of the recognized modes of acquisition. Halleck's Intern. Law, 131. Ortolan, *Règl. Intern.* liv. ii. ch. 8.]—D.

(a) Life and Works of Sir L. Jenkins, ii. 727, 728, 780. Opinion of the United-States Attorney-General on the capture of the British ship *Grange* in the Delaware Bay, 1793. Waite's⁽¹⁾ American State Papers, i. 75. Dodson's Adm. Reports, ii. 245. Le Louis,⁽¹¹⁾ Cranch's Reports, ii. 187. Church v. Hubbard.⁽¹¹¹⁾ Vattel, *Droit des Gens*, liv. i. ch. 22^(1v) § 281.

[¹⁰⁸ *Municipal Seizures beyond the Marine League or Cannon-shot*.—The statement in the

[¹ For Waite's read Wait's.]—G.G.W.

[¹¹ For Dodson's Adm. Reports, ii. 245. Le Louis, read Le Louis, Dodson's Adm. Reports, ii. 245.]—G.G.W.

[¹¹¹ For Cranch's Reports, ii. 187. Church v. Hubbard read Church v. Hubbard, Cranch's Reports, ii. 187.]—G.G.W.

[^{1v} For 22 read 23.]—G.G.W.

§ 180. The right of fishing in the waters adjacent to the coasts of any nation, within its territorial limits, belongs exclusively to the Right of fishery.

text requires further consideration. It has been seen that the consent of nations extends the territory of a State to a marine league or cannon-shot from the coast. Acts done within this distance are within the sovereign territory. The war-right of visit and search extends over the whole sea. But it will not be found that any consent of nations can be shown in favor of extending what may be strictly called territoriality, for any purpose whatever, beyond the marine league or cannon-shot. Doubtless States have made laws, for revenue purposes, touching acts done beyond territorial waters; but it will not be found, that, in later times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign States, or that a clear and unequivocal judicial precedent now stands sustaining such seizures, when the question of jurisdiction has been presented. The revenue laws of the United States, for instance, provide that if a vessel, bound to a port in the United States, shall, except from necessity, unload cargo within four leagues of the coast, and before coming to the proper port for entry and unloading, and receiving permission to do so, the cargo is forfeit, and the master incurs a penalty (Act 2d March, 1797,^[1] § 27); but the statute does not authorize a seizure of a foreign vessel when beyond the territorial jurisdiction. The statute may well be construed to mean only that a foreign vessel, coming to an American port, and there seized for a violation of revenue regulations committed out of the jurisdiction of the United States, may be confiscated; but that, to complete the forfeiture, it is essential that the vessel shall be bound to, and shall come within, the territory of the United States, after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the revenue laws within the jurisdiction. Under the previous sections of that act, it is made the duty of revenue-officers to board all vessels, for the purpose of examining their papers, within four leagues of the coast. If foreign vessels have [259] been boarded and seized on the high sea, and have been adjudged guilty, and their governments have not objected, it is probably either because they were not appealed to, or have acquiesced, in the particular instance, from motives of comity.

The cases cited in the author's note do not necessarily and strictly sustain the position taken in the text. In *The Louis* (Dodson, ii. 245), the arrest was held unjustified, because made in time of peace for a violation of municipal law beyond territorial waters. The words of Sir William Scott, on pages 245 and 246, with reference to the Hovering Acts, are only illustrative of the admitted rule, that neighboring waters are territorial; and he does not say, even as an *obiter dictum*, that the territory for revenue purposes extends beyond that claimed for other purposes. On the contrary, he says that an inquiry for fiscal or defensive purposes, near the coast but beyond the marine league, as under the hovering-laws of Great Britain and the United States, 'has nothing in common with the right of visitation and search upon the unappropriated parts of the ocean;' and adds, 'A recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied, in a manner not very consistent or intelligible, with a disclaimer of all right of visitation, was resisted by the British Government, and was finally withdrawn.' Church v. Hubbard^[11] (Cranch, ii. 187) was an action on a policy of insurance, in which there was an exception of risks of illicit trade with the Portuguese. The voyage was for such an illicit trade, and the vessel, in pursuance of that purpose, came to anchor within about four leagues of the Portuguese coast; and the master went on shore on business, where he was arrested, and the vessel was afterwards seized at her anchorage and condemned. The owner sought to recover for the condemnation. The court held, that it was not necessary for the defendants to prove an illicit trade begun, but only that the risks excluded were incurred by the prosecution of such a voyage. It is true, that Chief Justice Marshall admitted the right of a nation to secure itself against intended violations of its laws, by seizures made within reasonable limits, as to which, he said, nations must exercise comity and concession, and the exact extent of which, was not settled; and, in the case before the court, the four leagues were not treated as rendering the seizure illegal. This remark must now be treated as an unwarranted admission. The result of the decision is, that the court did not undertake to pronounce judicially, in a suit on a private contract, that a seizure of an American vessel, made at four leagues, by a foreign power, was void and a mere trespass. In the subsequent case of *Rose v. Himely* (Cranch, iv. 241), where a vessel was seized ten leagues from the French coast, and taken to a Spanish port, and condemned in a French

[¹ For 1797 read 1799.]—G.G.W.

[¹¹ For Hubbard read Hubbart.]—G.G.W.

subjects of the State. The exercise of this right, between France and Great Britain, was regulated by a Convention concluded between these two powers, in 1839; by the 9th article of which it is provided, that French subjects shall enjoy the exclusive right of fishing along the whole extent of the coasts of France, within the distance of three geographical miles from the shore, at low-water mark, and that British subjects shall enjoy the same exclusive right along the whole extent of the coasts [260] of the British Islands, within the same distance; it being understood, that upon that part of the coasts of France lying between Cape Carteret and the point of Monga, the exclusive right of French subjects shall only extend to the fishery within the limits mentioned in the first article of the Convention; it being also understood, that the distance of three miles, limiting the exclusive right of fishing

tribunal under municipal and not belligerent law, the court held that any seizures for municipal purposes beyond the territory of the sovereign are invalid; assuming, perhaps, that ten leagues must be beyond the territorial limits, for all purposes. In *Hudson v. Guestier* (Cranch, iv. 293), where it was agreed that the seizure was municipal, and was made within a league of the French coast, the majority of the court held, that the [260] jurisdiction to make a decree of forfeiture was not lost by the fact that the vessel was never taken into a French port, if possession of her was retained, though in a foreign port. The judgment being set aside and a new trial ordered, the case came up again, and is reported in Cranch, vi. 281. At the new trial, the place of seizure was disputed; and the judge instructed the jury, that a municipal seizure, made within six leagues of the French coast, was valid, and gave a good title to the defendant. The jury found a general verdict for the defendant, and exceptions were taken to the instructions. The Supreme Court sustained the verdict,—not, however, upon the ground that a municipal seizure made at six leagues from the coast was valid, but on the ground that the French decree of condemnation must be considered as settling the facts involved: and, if a seizure within a less distance from shore was necessary to jurisdiction, the decree may have determined the fact accordingly; and the verdict in the Circuit Court did not disclose the opinion of the jury on that point. The judges differed in stating the principle of this case and of *Rose v. Himely*; and the report leaves the difference somewhat obscure.

This subject was discussed incidentally in the case of the *Cagliari*, which was a seizure on the high seas, not for violation of revenue laws, but on a claim somewhat mixed of piracy and war. In the opinion given by Dr. Twiss to the Sardinian Government in that case, the learned writer refers to what has sometimes been treated as an exceptional right of search and seizure, for revenue purposes, beyond the marine league; and says that no such exception can be sustained as a right. He adds: 'In ordinary cases, indeed, where a merchant-ship has been seized on the high seas, the sovereign whose flag has been violated waives his privilege; considering the offending ship to have acted with *mala fides* towards the other State with which he is in amity, and to have consequently forfeited any just claim to his protection.' He considers the revenue regulations of many States, authorizing visit and seizure beyond their waters, to be enforceable at the peril of such States, and to rest on the express or tacit permission of the States whose vessels may be seized.

It may be said that the principle is settled, that municipal seizures cannot be made, for any purpose, beyond territorial waters. It is also settled, that the limit of these waters is, in the absence of treaty, the marine league or the cannon-shot. It cannot now be successfully maintained, either that municipal visits and search may be made beyond the territorial waters for special purposes, or that there are different bounds of that territory for different objects. But, as the line of territorial waters, if not fixed, is dependent on the unsettled range of artillery fire, and, if fixed, must be by an arbitrary measure, the courts, in the earlier cases, were not strict as to standards of distance, where no foreign powers intervened in the causes. In later times, it is safe to infer that judicial as well as political tribunals will insist on one line of marine territorial jurisdiction for the exercise of force on foreign vessels, in time of peace, for all purposes alike.]—D.

upon the coasts of the two countries, shall be measured, in respect to bays of which the opening shall not ex[261]ceed ten miles, by a straight line drawn from one cape to the other.^(a)

By the 1st article of the Convention of 1818, between the United States and Great Britain, reciting, that 'Whereas differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof, to take, dry, and cure, fish, on certain coasts, bays, harbours, and creeks, of His Britannic Majesty's dominions in America,' it was agreed between the contracting parties, 'that the inhabitants of the said United States shall have, forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours, and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straights of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company: And that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, hereabove described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose, with the inhabitants, proprietors, or possessors, of the ground. And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours, of His Britannic Majesty's dominions in America, not included within the abovementioned limits:¹⁰⁹ Provided, however, that the American fishermen shall be admitted to enter such bays or harbours, for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to [262] prevent their taking, drying, or curing, fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.'¹¹⁰(b)

(a) *Annales Maritimes et Coloniales*, 1839, 1^{re} Partie, p. 861.

[¹⁰⁹ It was decided by the mixed commission between the United States and Great Britain, under the convention of 1853, that the Bay of Fundy was not a British bay, from which United States fishermen were excluded by the convention of 1818, but an open and common sea. See note, *infra*,¹¹¹ on 'The North-Eastern Fisheries.']—D.

(b) Elliot's Diplomatic Code, i. 281.

[¹¹⁰ The treaty of June 5, 1854, commonly called the Reciprocity Treaty, adjusted the

[¹ Quotation ends here.]-G.G.W.

[¹¹ For note, *infra* read note 142, *infra*.]-G.G.W.

Claims to portions of the sea upon the ground of prescription.

§ 181. Besides those bays, gulfs, straits, mouths of rivers, and estuaries which are inclosed by capes and headlands belonging to the territory of the State, a jurisdiction and right of property over certain other portions of the sea have been claimed by different nations, on the ground of immemorial use. Such, for example, was the sovereignty formerly claimed by the Republic of Venice over the Adriatic. The maritime supremacy claimed by Great Britain over what are called the Narrow Seas has generally been asserted merely by requiring certain honors to the British flag in those seas, which have been rendered or refused by other nations, according to circumstances; but the claim itself has never been sanctioned by general acquiescence.(a)

Straits are passages communicating from one sea to another. If the navigation of the two seas thus connected is free, the navigation of the channel by which they are connected ought also to be free. Even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected. Such right may, however, be modified by special compact, adopting those regulations which are indispensably necessary to the security of the State whose interior waters thus form the channel of communication between different seas, the navigation of which is free to other nations. Thus the passage of the strait may remain free to the private merchant vessels of those nations having a right to navigate the seas it connects, whilst it is shut to all foreign armed ships in time of peace.

The Black Sea, the Bosphorus, and the Dardanelles.

§ 182. So long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might with propriety be considered a *mare clausum*; and there seems no reason to question the right of the Ottoman Porte to exclude other nations from navigating the passage which connects it with the Mediterranean, both shores of this passage being at the same time portions of the Turkish territory; but since the territorial acquisitions made by Russia, and the commercial establish-

open questions as to rights of fishery between British and American subjects. It gave to citizens of the United States, in addition to their rights under the treaty of 1818, the right to take fish, except shell-fish, 'on the sea coasts and shores, and in the bays, harbours, and creeks of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore,' with permission to land for the purpose of drying nets and curing fish. Corresponding rights were given to British subjects to take sea-fish and to land and dry nets on the coast of the United States, north of latitude 36° N. The treaty did not embrace the salmon and shad fisheries, or the fisheries at the mouths of rivers. (U. S. Laws, x. 199.) But this treaty, in accordance with a provision for the purpose, was terminated, after ten years, by a notice given by the President in pursuance of a resolution of Congress of Jan. 18, 1865. U. S. Laws, xiii. 566.]—D.

(a) Vattel, *Droit des Gens*, liv. i. ch. 23, § 289. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. ii. ch. 1, § 42. Edinburgh Review, vol. xi. art. 1, pp. 17-19, Wheaton's *Hist. Law of Nations*, 154-157. Klüber, § 132.

ments formed by her on the shores of the Euxine, both that empire and the other maritime powers have become entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus. This right was expressly recognized by the seventh article of the treaty of Adrianople, concluded in 1829, between Russia and the Porte, both as to Russian vessels and those of other European States in amity with Turkey.(a)

The right of foreign vessels to navigate the interior waters of Turkey, which connect the Black Sea with the Mediterranean, does not extend to ships of war. The ancient rule of the Ottoman Empire, established for its own security, by which the entry of foreign vessels of war into the canal of Constantinople, including the strait of the Dardanelles and that of the Black Sea, has been at all times prohibited, was expressly recognized by the treaty concluded at London the 13th July, 1841, between the five great European powers and the Ottoman Porte.

By the first article of this treaty, the Sultan declared his firm resolution to maintain, in future, the principle invariably established as the ancient rule of his empire; and that so long as the Porte should be at peace, he would admit no foreign vessel of war into the said straits. The five powers, on the other hand, engaged to respect this determination of the Sultan, and to conform to the above-mentioned principle.

[264] By the second article it was provided, that, in declaring the inviolability of this ancient rule of the Ottoman Empire, the Sultan reserved the faculty of granting, as heretofore, firmans allowing the passage to light armed vessels employed according to usage, in the service of the diplomatic legations of friendly powers.

By the third article, the Sultan also reserved the faculty of notifying this treaty to all the powers in amity with the Sublime Porte, and of inviting them to accede to it.(b)¹¹¹

(a) Martens, *Nouveau Recueil*, tom. viii. p. 143.

(b) Wheaton's *Hist. Law of Nations*, 583-585.

[¹¹¹] The treaty of Paris of 1856, between Great Britain, France, Russia, Prussia, Austria, Sardinia, and Turkey, re-establishes the principles of the Convention of 1841, with some changes. It respects the right of Turkey to exclude all vessels of war from passing the Dardanelles and Bosphorus when she is at peace, and to make an exception in favor of light armed vessels used in diplomatic service, by special firmans. It 'neutralizes' the Black Sea, by declaring it open to the commerce of all nations, and by excluding from it vessels of war of all nations, whether possessing territory on its waters or not, and by prohibiting to Russia and Turkey the maintenance of military-maritime arsenals in its ports. It allows the passage of light armed vessels in diplomatic service, and gives to each of the seven contracting powers the right to keep two light armed vessels at the mouth of the Danube, to insure the execution of the regulations made by or under the treaty; and to Russia and Turkey, the right to maintain a limited number of small armed steamers for coast-service.

By the treaty of the 25th February, 1862, between the United States and Turkey, the United States are placed, or rather continued, on the footing of the most favored nations with regard to passing the Dardanelles and Bosphorus, and to trading in the Black Sea. U. S. Laws, xii. 271.]—D.

Danish
sovereignty
over the
Sound and
the Belts.

§ 183. The supremacy asserted by the King of Denmark over the Sound and the two Belts which form the outlet of the Baltic Sea into the ocean, is rested by the Danish public jurists upon immemorial prescription, sanctioned by a long succession of treaties with other powers. According to these writers, the Danish claim of sovereignty has been exercised from the earliest times beneficially for the protection of commerce against pirates and other enemies by means of guardships, and against the perils of the sea by the establishment of lights and landmarks. The Danes continued for several centuries masters of the coasts on both sides of the Sound, the province of Scania not having been ceded to Sweden until the treaty of Roeskild, in 1658, confirmed by that of 1660, in which it was stipulated that Sweden should never lay claim to the Sound tolls in consequence of the cession, but should content herself with a compensation for keeping up the light-houses on the coast of Scania. The exclusive right of Denmark was recognized as early as 1368, [265] by a treaty with the Hanseatic republics, and by that of 1490, with Henry VII. of England, which forbids English vessels from passing the Great Belt as well as the Sound, unless in case of unavoidable necessity; in which case they were to pay the same duties at Wyborg as if they had passed the Sound at Elsinore. The treaty concluded at Spire, in 1544, with the Emperor Charles V., which has commonly been referred to as the origin, or at least the first recognition, of the Danish claim to the Sound tolls, merely stipulates, in general terms, that the merchants of the Low Countries frequenting the ports of Denmark should pay the same duties as formerly.

The treaty concluded at Christianople, in 1645, between Denmark and the United Provinces of the Netherlands, is the earliest convention with any foreign power by which the amount of duties to be levied on the passage of the Sound and Belts was definitely ascertained. A tariff of specific duties on certain articles therein enumerated was annexed to this treaty, and it was stipulated that 'goods not mentioned in the list should pay, according to mercantile usage, and what has been practised from ancient times.'

A treaty was concluded between the two countries at Copenhagen, in 1701, by which the obscurity in that of Christianople as to the non-specified articles, was meant to be cleared up. By the third article of the new treaty it was declared that as to the goods not specified in the former treaty, 'the Sound duties are to be paid *according to their value*;' that is, they are to be valued *according to the place from whence they come*, and one per centum of their value to be paid.

These two treaties of 1645 and 1701, are constantly referred to in all subsequent treaties, as furnishing the standard by which the rates of these duties are to be measured as to *privileged* nations. Those *not privileged*, pay according to a more ancient tariff for the

specified articles, and one and a quarter per centum on unspecified articles.(a)

§ 184. By the arrangement concluded at London and Elsinore, in 1841, between Denmark and Great Britain, the tariff of duties levied on the passage of the Sound and Belts was revised, the duties on non-enumerated articles were made specific, and others reduced in amount, whilst some of the abuses [266] which had crept into the manner of levying the duties in general were corrected. The benefit of this arrangement, which is to subsist for the term of ten years, has been extended to all other nations *privileged by treaty*.(a)¹¹²

Convention of 1841.

§ 185. The Baltic Sea is considered by the maritime powers bordering on its coasts as *mare clausum* against the exercise of hostilities upon its waters by other States, whilst the Baltic powers are at peace. This principle was proclaimed in the treaties of armed neutrality in 1780 and 1800, and by the treaty of 1794, between Denmark and Sweden, guarantying the tranquillity of that sea. In the Russian declaration of war against Great Britain of 1807, the inviolability of that sea and the reciprocal guaranties of the powers that border upon it (guaranties said to have been contracted with the knowledge of the

Qu. Whether the Baltic Sea is *mare clausum*?

(a) Schlegel, Staats-Recht des Königreichs Dänemark, 1 Th. Kap. 7,⁽¹⁾ §§ 27-29. Wheaton Hist. Law of Nations, 158-161.

(a) Scherer, Der Sundzoll, seine Geschichte, sein jetziger Bestand, und seine staatsrechtlich-politische Lösung, Beilage Nr. 8-9.

[¹¹² *The Sound Dues*.—The subject of the Sound Dues was put at rest by the treaty of 1857, to which the five powers—the powers on the Baltic and North Sea—were parties. It avoids a recognition of a right in Denmark to levy duties on passing vessels. It makes a compensation to Denmark in a capital sum, the payment of which is put on the ground of indemnity for maintaining lights and buoys, which Denmark stipulates to maintain, and not for her renunciation of the right to levy duties; and Denmark agrees to levy no further duties, without admitting that the levying of them theretofore had been objectionable. The United States declined to take part in this convention, on the ground that it might involve questions of purely European policy, and because the invitation from Denmark seemed to assume her right to levy the duties, and to receive compensation for abstaining therefrom; and made a separate treaty with Denmark, of the 11th April, 1857, by which Denmark declares the Baltic open to American vessels, and stipulates to maintain buoys and lights, and to furnish pilots, if desired, in consideration of which the United States agree to pay \$393,011. (Annual Reg. 1857, p. 12-40;⁽¹¹⁾ and 1858, p. 830. U. S. Laws, xi. 719. Martens, xvi. 331-345.) For a history of the progress of this subject between 1830 and the adoption of these treaties, see Wheaton's Hist. Law of Nations, 158. Webster's Works, vi. 406. Ex. Doc. 108 1st Sess. 33d Cong.: Message of President Pierce, December, 1854.

Tolls on the Elbe.—By the treaty of Hanover of 1861, the tolls laid by Hanover on vessels navigating the Elbe, known as the Stade or Brunshausen tolls, which are said to have been levied for eight hundred years, were abolished, as against the parties to the treaty, by a capitalization, on the principle of a fifteen-and-a-half-years' purchase at their average amounts, for 3,100,000 thalers, of which Great Britain paid one-third, Hamburg one-third, and the residue was to be paid by the other powers concerned. The United States made a treaty with Hanover, of 6th November, 1861, by which these tolls are abolished as to American vessels for the sum of 63,353⁽¹¹¹⁾ thalers. U. S. Laws, xii. 253 1.—D.

[¹ For 7 read 6.]—G.G.W.

[¹¹ For Annual Reg. 1857, p. 12-40 read Almanack de Gotha, 1857, p. (12), (40).]—G.G.W.

[¹¹¹ For 63,353 read 60,353.]—G.G.W.

British government) were stated as aggravations of the British proceedings in entering the Sound and attacking the Danish capital in that [267] year. In the British answer to this declaration it was denied that Great Britain had at any time acquiesced in the principles upon which the inviolability of the Baltic is maintained; however she might, at particular periods, have forborne, for special reasons influencing her conduct at the time, to act in contradiction to them. Such forbearance never could have applied but to a state of peace and real neutrality in the north; and she could not be expected to recur to it after France had been suffered, by the conquest of Prussia, to establish herself in full sovereignty along the whole coast from Dantzic to Lubeck.(a)

Controversy
respecting
the dominion
of the seas.

§ 186. The controversy, how far the open sea or main ocean, beyond the immediate vicinity of the coasts, may be appropriated by one nation to the exclusion of others, which once exercised the pens of the ablest and most learned European jurists, can hardly be considered open at this day. Grotius, in his treatise on the Law of Peace and War, hardly admits more than the possibility of appropriating the waters immediately contiguous, though he adduces a number of quotations from ancient authors, showing that a broader pretension has been sometimes sanctioned by usage and opinion. But he never intimates that any thing more than a limited portion could be thus claimed; and he uniformly speaks of '*pars*,' or '*portus maris*,' always confining his view to the effect of the neighboring land in giving a jurisdiction and property of this sort.(a) He had previously taken the lead in maintaining the common right of mankind to the free navigation, commerce, and fisheries of the Atlantic and Pacific Oceans, against the exclusive claims of Spain and Portugal, founded on the right of previous discovery, confirmed by possession and the papal grants. The treatise *De Mare Libero* was published in 1609. The claim of sovereignty asserted by the kings of England over the British seas was supported by Albericus Gentilis in his *Advocatio Hispanica* in 1613. In 1635, Selden published his *Mare Clausum*, in which the general principles maintained by Grotius are called in question, and the claim of England more fully vindicated than by Gentilis. The first book of Selden's celebrated treatise is devoted to the proposition that the sea may be made property, which he attempts to show, not by reasoning, but by collecting a multitude of quotations from ancient authors, [268] in the style of Grotius, but with much less selection. He nowhere grapples with the arguments by which such a vague and extensive dominion is shown to be repugnant to the law of nations. And in the second part, which indeed is the main object of his work, he has recourse only to proofs of usage and of positive compact, in order to show that Great

(a) Annual Register, xlix. State Papers, 773.

(a) De Jur. Bell. ac Pac. lib. ii. cap. 3, §§ 8-13.

Britain is entitled to the sovereignty of what are called the Narrow Seas. Father Paul Sarpi, the celebrated historian of the Council of Trent, also wrote a vindication of the claim of the Republic of Venice to the sovereignty of the Adriatic. (b) Bynkershoek examined the general question, in the earliest of his published works, with the vigor and acumen which distinguish all his writings. He admits that certain portions of the sea may be susceptible of exclusive dominion, though he denies the claim of the English crown to the British seas, on the ground of the want of uninterrupted possession. He asserts that there was no instance, at the time when he wrote, in which the sea was subject to any particular sovereign, where the surrounding territory did not also belong to him. (c) Puffendorf lays it down, that in a narrow sea the dominion belongs to the sovereigns of the surrounding land, and is distributed, where there are several such sovereigns, according to the rules applicable to neighboring proprietors on a lake or river, supposing no compact has been made, 'as is pretended,' he says, 'by Great Britain;' but he expresses himself with a sort of indignation at the idea that the main ocean can ever be appropriated. (d) The authority of Vattel would be full and explicit to the same purpose, were it not weakened by the concession, that though the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on [269] the ground of immemorial use, nor lost to others by non-user, on the principle of prescription, yet it may be thus established where the non-user assumes the nature of a consent or tacit agreement, and thus becomes a title in favor of one nation against another. (e)

§ 187. On reviewing this celebrated controversy it may be affirmed, that if those public jurists who have asserted the exclusive right of property in any particular nation over portions of the sea, have failed in assigning sufficient grounds for such a claim, so also the arguments

Review of
the points.

(b) Paolo Sarpi, *Del dominio del mare Adriatico e sui reggioni per il Jus Belli della Serenissima Rep. di Venezia, Venet.* 1676, 12º.

(c) De Dominio Maris, Opera Minora, Dissert. VI., first published in 1702⁽¹⁾.

'Nihil addo, quàm sententiæ nostræ hanc conjectionem: Oceanus, quâ patet, totus imperio subijci non potest; pars potest, possunt et maria mediterranea, quotquot sunt, omnia. Nullum tamen mare mediterraneum, neque ulla pars Oceani ditone alicujus Principis tenetur, nisi quâ in continentis sit imperio. Pronunciamus MARE LIBERUM, quod non possidetur vel universum possideri nequit, CLAUSUM, quod post justam occupationem navi unâ pluribusve olim possessum fuit, et si est in fatis, possidebitur posthac; nullum equidem nunc agnoscimus subditum, cùm non sufficiat id affectasse, quin vel aliquando occupasse et possedissee, nisi etiamnum duret possessio, quæ gentium hodie est nullibi; ita libertatem et imperium, quæ haud⁽¹¹⁾ facile miscentur, unâ sede⁽¹¹¹⁾ locamus.' Ib. cap. vii. ad finem.

(d) De Jure Naturæ et Gentium, lib. iv. cap. 5, § 7.

(e) Droit des Gens, liv. i. ch. 23, §§ 279-286.

As to the maritime police which may be exercised by any nation, on the high seas, for the punishment of offences committed on board its own vessels, or for the suppression of piracy and the African slave trade, *vide supra*, §§ 106 *et seq.*, and notes 83, 85, and 108.

[¹ For 1702 read 1703.]—G.G.W.

[¹¹ For haud read haut.]—G.G.W.

[¹¹¹ For unâ sede read unâ heic sede.]—G.G.W.

alleged by their opponents for the contrary opinion must often appear vague, futile, and inconclusive. There are only two decisive reasons applicable to the question. The first is physical and material, which alone would be sufficient; but when coupled with the second reason, which is purely moral, will be found conclusive of the whole controversy.

I. Those things which are originally the common property of all mankind can only become the exclusive property of a particular individual or society of men, by means of possession. In order to establish the claim of a particular nation to a right of property in the sea, that nation must obtain and keep possession of it, which is impossible.

II. In the second place, the sea is an element which belongs equally to all men, like the air. No nation, then, has the right to appropriate it, even though it might be physically possible to do so.

It is thus demonstrated, that the sea cannot become the exclusive property of any nation. And, consequently, the use of the sea, for these purposes, remains open and common to all mankind.^(a)¹¹³

[270] We have already seen that, by the generally approved usage of nations, which forms the basis of international law, the maritime territory of every State extends:

1st. To the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same State.

2dly. To the distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the State.

3dly. To the straits and sounds, bounded on both sides of the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another.^(b)

(a) Ortolan, *Règles Internationales et Diplomatie de la Mer*, tom. i. pp. 120-126.

[¹¹³ *National Appropriation of Open Seas*.—The right of one nation, or of several nations, to an exclusive jurisdiction over an open sea, was, as stated in the text, rested solely on a kind of prescription. But, however long acquiesced in, such an appropriation is inadmissible, in the nature of things; and, whatever may be the evidence of the time or nature of the use, it is set aside as a bad usage, which no evidence can make legal. Halleck says (*Intern. Law*, 135), 'No one would think of reviving this controversy,'⁽¹⁾ which once occupied the pens of the ablest European jurists.' And it [270] may be said to be now *res adjudicata*, that the only question is whether a given sea or sound is in fact, as a matter of politico-physical geography, within the exclusive jurisdiction of one nation. The claim of several nations, whose borders surround a large open sea, to combine and make it a *mare clausum* against the rest of the world, cannot be admitted. The making of such a claim to the Baltic was the infirmity of the position taken by the Armed Neutrality in 1780 and 1800, and in the Russian declaration of war against England in 1807. Ortolan, *Règles Intern.* i. 120-126. Kent's *Comm.* (Abdy's edit.) i. 110-112. Wildman's *Intern. Law*, i. 71. Heffter, *Europ. Völker*, § 75. De Cussy, *Droit Marit.* liv. i. tit. 2, § 39. Halleck's *Intern. Law*, 135. Woolsey's *Introd.* §§ 54-56. Manning, *Law of Nations*, 25.⁽¹¹⁾ Rayneval, *de la Liberté des Mers*, ii. 1-108. Hautefeuille, *Droits des Nat. Neutr.* liv. i. tit. 1, ch. 1, § 4. Twee Gebroeders, *Rob.* iii. 336. Forty-nine casks of brandy, *Hagg.* iii. 290.]-D.

(b) *Vide supra*, §§ 177-181.

[¹ For would think of reviving this controversy *read* would now think of reviving the controversy.]-G.G.W.

[¹¹ For 25 *read* 257.]-G.G.W.

§ 188. The reasons which forbid the assertion of an exclusive proprietary right to the sea in general, will be found inapplicable to the particular portions of that element included in the above designations. Ports, mouths of rivers, &c.

1. Thus, in respect to those portions of the sea which form the ports, harbors, bays, and mouths of rivers of any State where the tide ebbs and flows, its exclusive right of property, as well as sovereignty, in these waters, may well be maintained, consistently with both the reasons above mentioned, as applicable to the sea in general. The State possessing the adjacent territory, by which these waters are partially surrounded and inclosed, has that physical power of constantly acting upon them, and, at the same time, of excluding, at its pleasure, the action of any other State or person, which, as we have already seen, constitutes possession. These waters cannot be considered as having been intended by the Creator for the common use of all mankind, any more than the adjacent land, which has already been appropriated by a particular [271] people. Neither the material nor the moral obstacle, to the exercise of the exclusive rights of property and dominion, exists in this case. Consequently, the State within whose territorial limits these waters are included, has the right of excluding every other nation from their use. The exercise of this right may be modified by compact, express or implied; but its existence is founded upon the mutual independence of nations, which entitles every State to judge for itself as to the manner in which the right is to be exercised, subject to the equal reciprocal rights of all other States to establish similar regulations, in respect to their own waters.(a)

§ 189. 2. It may, perhaps, be thought that these considerations do not apply, with the same force, to those portions of the sea which wash the coasts of any particular State, within the distance of a marine league, or as far as a cannon-shot will reach from the shore. The physical power of exercising an exclusive property and jurisdiction, and of excluding the action of other nations within these limits, exists to a certain degree; but the moral power may, perhaps, seem to extend no further than to exclude the action of other nations to the injury of the State by which this right is claimed. It is upon this ground that is founded the acknowledged immunity of a neutral State from the exercise of acts of hostility, by one belligerent power against another, within those limits. This claim has, however, been sometimes extended to exclude other nations from the innocent use of the waters washing the shores of a particular State, in peace and in war; as, for example, for the purpose of participating in the fishery, which is generally appropriated to the subjects of the State within that distance of the coasts. This exclusive claim is sanctioned both by usage and

The marine league.

(a) *Vide supra*, § 95.

convention, and must be considered as forming a part of the positive law of nations.^(a)

Straits and
sounds.

§ 190. 3. As to straits and sounds, bounded on both sides by the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another, we have already seen that the territorial sovereignty may be limited, by the right of other nations [272] to navigate the seas thus connected. The physical power which the State, bordering on both sides the sound or strait, has of appropriating its waters, and of excluding other nations from their use, is here encountered by the moral obstacle arising from the right of other nations to communicate with each other. If the Straits of Gibraltar, for example, were bounded on both sides by the possessions of the same nation, and if they were sufficiently narrow to be commanded by cannon-shot from both shores, this passage would not be the less freely open to all nations; since the navigation, both of the Atlantic Ocean and the Mediterranean Sea, is free to all. Thus it has already been stated that the navigation of the Dardanelles and the Bosphorus, by which the Mediterranean and Black Seas are connected together, is free to all nations, subject to those regulations which are indispensably necessary for the security of the Ottoman Empire. In the negotiations which preceded the signature of the treaty of intervention, of the 15th of July, 1840, it was proposed, on the part of Russia, that an article should be inserted in the treaty, recognizing the permanent rule of the Ottoman Empire; that, whilst that empire is at peace, the Straits, both of the Bosphorus and the Dardanelles, are considered as shut against the ships of war of all nations. To this proposition it was replied, on the part of the British government, that its opinion respecting the navigation of these Straits by the ships of war of foreign nations rested upon a general and fundamental principle of international law. Every State is considered as having territorial jurisdiction over the sea which washes its shores, as far as three miles from low-water mark; and, consequently, any strait which is bounded on both sides by the territory of the same sovereign, and which is not more than six miles wide, lies within the territorial jurisdiction of that sovereign. But the Bosphorus and Dardanelles are bounded on both sides by the territory of the Sultan, and are in most parts less than six miles wide; consequently his territorial jurisdiction extends over both those Straits, and he has a right to exclude all foreign ships of war from those Straits, if he should think proper so to do. By the treaty of 1809, Great Britain acknowledged this right on the part of the Sultan, and

(a) Martens, *Précis du Droit des Gens Moderne de l'Europe*, § 153. 'Mais si loin de s'en emparer, il a une fois reconnu le droit commun des autres peuples d'y venir pêcher, il ne peut plus les en exclure; il a laissé cette pêche dans sa communion primitive, au moins à l'égard de ceux qui sont en possession d'en profiter.' Vattel, *Droit des Gens*, liv. i. ch. 23, § 287.

promised to acquiesce in the enforcement of it; and it was but just that Russia should take the same engagement. The British government was of opinion, that the exclusion of all foreign ships of war from the two Straits would be more conducive to the main[273]tenance of peace, than an understanding that the Strait in question should be a general thoroughfare, open, at all times, to ships of war of all countries; but whilst it was willing to acknowledge by treaty, as a general principle and as a standing rule, that the two Straits should be closed for all ships of war, it was of opinion, that if, for a particular emergency, one of those Straits should be open for one party, the other ought, at the same time, to be open for other parties, in order that there should be the same parity between the condition of the two Straits, when open and shut; and, therefore, the British government would expect that, in that part of the proposed Convention which should allot to each power its appropriate share of the measures of execution, it should be stipulated, that if it should become necessary for a Russian force to enter the Bosphorus, a British force should, at the same time, enter the Dardanelles.

§ 191. It was accordingly declared, in the 4th article of the convention, that the co-operation destined to place the Straits of the Dardanelles and the Bosphorus and the Ottoman capital under the temporary safeguard of the contracting parties, against all aggression of Mehemet Ali, should be considered only as a measure of exception, adopted at the express request of the Sultan, and solely for his defence, in the single case above mentioned; but it was agreed that such measure should not derogate, in any degree, from the ancient rule of the Ottoman Empire, in virtue of which it had, at all times, been prohibited for ships of war of foreign powers to enter those Straits. And the Sultan, on the one hand, declared that, excepting the contingency above mentioned, it was his firm resolution to maintain, in future, this principle invariably established as the ancient rule of his Empire, and, so long as the Porte should be at peace, to admit no foreign ship of war into these Straits; on the other hand, the four powers engaged to respect this determination, and to conform to the above-mentioned principle.

The Dardanelles.

This rule, and the engagement to respect it, as we have already seen, were subsequently incorporated into the treaty of the 13th July, 1841, between the five great European powers and the Ottoman Porte; and as the right of the private merchant vessels of all nations, in amity with the Porte, to navigate the interior waters of the Empire which connect the Mediterranean and Black Seas, was recognized by the treaty of Adrianople, in 1829, between [274] Russia and the Porte; the two principles—the one excluding foreign ships of war, and the other admitting foreign merchant vessels to navigate those waters—may

be considered as permanently incorporated into the public law of Europe.(a)¹¹⁴

Rivers forming part of the territory of the State. § 192. The territory of the State includes the lakes, seas, and rivers, entirely inclosed within its limits.¹¹⁵ The rivers which flow through the territory also form a part of the domain, from their sources to their mouths, or as far as they flow within the territory, including the bays or estuaries formed by their junction with the sea. Where a navigable river forms the boundary of conterminous States, the middle of the channel, or *Thalweg*, is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river.(a)

Right of innocent passage on rivers flowing through different States. § 193. Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an *innocent use*. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the [275] State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.(a)

Incidental right to use the banks of the rivers. § 194. It seems that this right draws after it the incidental right of using all the means which are necessary to the secure enjoyment of the principal right itself. Thus the Roman law, which considered navigable rivers as public or common property, declared that the right to the use of the shores was incident to that of the water; and that the right to navigate a river involved the right to moor vessels to its banks, to lade and unlade cargoes, &c. The public jurists apply this principle

(a) Wheaton's Hist. Law of Nations, 577-583.

[¹¹⁴ See note III, *ante*, on the treaty of Paris of 1856.]—D.

[¹¹⁵ Halleck's Intern. Law, 136. Woolsey's Introd. §§ 57, 58. Kent's Intern. Law (Abdy's edit.), i. 108, and note.]—D.

(a) Vattel, Droit des Gens, liv. i. ch. 22, § 266. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. ii. ch. 1, § 39. Heffter, Europ. Völker. §§ 66-77.

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, §§ 12-14; cap. 3, §§ 7-12. Vattel, Droit des Gens, liv. ii. ch. 9, §§ 126-130; ch. 10, §§ 132-134. Puffendorf, de Jur. Naturæ et Gentium, lib. iii. cap. 3, §§ 3-6.

of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for these purposes, as means necessary to the attainment of the end for which the free navigation of the water is permitted.^(a)

§ 195. The incidental right, like the principal right itself, is imperfect in its nature, and the mutual convenience of both parties must be consulted in its exercise. These rights imperfect in their nature.

§ 196. Those who are interested in the enjoyment of these rights may renounce them entirely, or consent to modify them in such manner as mutual convenience and policy may dictate. A remarkable instance of such a renunciation is found in the treaty of Westphalia, 1648, confirmed by subsequent treaties, by which the navigation of the river Scheldt was closed to the Belgic provinces, in favor of the Dutch. The forcible opening of this navigation by the French on the occupation of Belgium by the arms of the French Republic, in 1792, in violation of these treaties, was one of the principal ostensible causes of the war between France on one side, and Great Britain and Holland on the other. By the treaties of Vienna, the Belgic provinces were united to Holland under the same sovereign, and the navigation of the Scheldt was placed on the same footing of freedom with that of the Rhine and other great European rivers. And by the treaty of 1831, for the separation of Holland from Belgium, the free [276] navigation of the Scheldt was, in like manner, secured, subject to certain duties, to be collected by the Dutch government.^(a)¹¹⁶ Modification of these rights by compact.

§ 197. By the treaty of Vienna, in 1815, the commercial navigation of rivers which separate different States, or flow through their respective territories, was declared to be entirely free in their whole course, from the point where each river becomes navigable to its Treaties of Vienna respecting the great European rivers.

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, § 15. Puffendorf, de Jur. Naturæ et Gentium, lib. iii. cap. 3, § 8. Vattel, Droit des Gens, liv. ii. ch. 9, § 129.

(a) Wheaton's Hist. Law of Nations, 282-284, 552.

[¹¹⁶ *The Scheldt Dues*.—By the treaty of May 12, 1863, between Belgium and the Netherlands, the King of the Netherlands renounces the Scheldt dues for 17,141,640 florins to be paid by Belgium. By a protocol of July 15, 1863, the King of the Netherlands makes a declaration to all the powers interested, that the renouncement of these dues applies to all flags; and the King of the Belgians makes a similar declaration on his part; and the representatives of the other powers interested, including the chief commercial nations of Europe, and the United States, make an official note of these declarations. By the Convention between the United States and Belgium of May 20, 1863, and the treaty of July 20, 1863, the United States agrees to pay a portion of the capitalization of the Scheldt dues; provided that the capital sum does not exceed thirty-six millions of francs, of which Belgium shall assume one-third, and that the share of the United States in the residue shall not exceed 2,779,200 francs. The treaty between Belgium and the Netherlands of May 12, 1863, with the protocol of July 15, 1863, and the declarations of Belgium and the Netherlands above referred to, are appended to the treaty between the United States and Belgium of July 20, 1863. The treaty of May 20, 1863, also provides that no tonnage duties shall be levied by Belgium on American vessels navigating the Scheldt, and for a reduction of pilotage and port dues on that river. U. S. Laws, 1865, p. 57.]—D.

mouth; provided that the regulations relating to the police of the navigation should be observed, which regulations were to be uniform, and as favorable as possible to the commerce of all nations.^(a)

By the *Annexe* xvi. to the final act of the Congress of Vienna, the free navigation of the Rhine is confirmed 'in its whole course, from the point where it becomes navigable to the sea, ascending or descending;' and detailed regulations are provided respecting the navigation of that river, and the Neckar, the Mayn, the Moselle, the Meuse, and the Scheldt, which are declared in like manner to be free from the point where each of these rivers becomes navigable to its mouth. Similar regulations respecting the free navigation of the Elbe were established among the powers interested in the commerce of that river, by an act signed at Dresden the 12th December, 1821. And the stipulations between the different powers interested in the free navigation of the Vistula and other rivers of ancient Poland, contained in the treaty of the 3d May, 1815, [277] between Austria and Russia, and of the same date between Russia and Prussia, to which last Austria subsequently acceded, are confirmed by the final act of the Congress of Vienna. The same treaty also extends the general principles adopted by the Congress relating to the navigation of rivers to that of the Po.^(b)¹¹⁷

Navigation
of the Rhine.

§ 198. The interpretation of the above stipulations respecting the free navigation of the Rhine, gave rise to a controversy between the kingdom of the Netherlands and the other States interested in the commerce of that river. The Dutch government claimed the exclusive right of regulating and imposing duties upon the trade, within its own territory, at the places where the different branches into which the Rhine divides itself fall into the sea. The expression in the treaties of Paris and Vienna '*jusqu'à la mer*,' to the sea, was said to be different in its import from the term '*dans la mer*,' into the sea: and, besides, it was added, if the upper States insist so strictly upon the terms of the treaties, they must be contented with the course of the proper Rhine itself. The mass of waters brought down by that river, dividing itself a short distance above Nimiguen, is carried to the sea through three

(a) Wheaton's Hist. Law of Nations, 498-501.

(b) Mayer,⁽¹⁾ Corpus Juris Germanici,⁽¹¹⁾ tom. ii. pp. 224-239, 298. Acte Final, art. 96, 114, 118.

[¹¹⁷ The treaty of Paris of 1856 applies the declaration of the freedom of rivers running between or through several States, by the Congress of Vienna, to the Danube, and opens it to the trade of all nations, with no duties founded solely on the right to navigate. It makes special provisions respecting police, quarantine, and customs duties, and the removal of physical obstructions to navigation. See also Art. 17 of treaty of 1857. Martens, Nouveau Recueil, xv. 647, 776; xvii.⁽¹¹¹⁾ 75, 622, 632.]—D.

[¹ For Mayer read Meyer.]—G.G.W.

[¹¹ For Juris Germanici read Juris Confoederationis Germanicae.]—G.G.W.

[¹¹¹ For xvii. read xvi.]—G.G.W.

principal channels, the Waal, the Leck, and the Yssel; the first descending by Gorcum, where it changes its name for that of the Meuse; the second approaching the sea at Rotterdam; and the third, taking a northerly course by Zutphen and Deventer, empties itself into the Zuyderzee. None of these channels, however, is called the Rhine; that name is preserved to a small stream which leaves the Leck at Wyck, takes its course by the learned retreats of Utrecht and Leyden, gradually dispersing and losing its waters among the sandy downs at Kulwyck. The proper Rhine being thus useless for the purposes of navigation, the Leck was substituted for it by common consent of the powers interested in the question; and the government of the Netherlands afterwards consented that the Waal, as being better adapted to the [278] purposes of navigation, should be substituted for the Leck. But it was insisted by that government that the Waal terminates at Gorcum, to which the tide ascends, and where, consequently, the Rhine terminates; all that remains of that branch of the river from Gorcum to Helvoetsluys and the mouth of the Meuse is an arm of the sea, inclosed within the territory of the kingdom, and consequently subject to any regulations which its government may think fit to establish.

On the other side, it was contended by the powers interested in the navigation of the river, that the stipulations in the treaty of Paris, in 1814, by which the sovereignty of the House of Orange over Holland was revived, with an accession of territory, and the navigation of the Rhine was, at the same time, declared to be free 'from the point where it becomes navigable to the sea,' were inseparably connected in the intentions of the allied powers who were parties to the treaty. The intentions thus disclosed were afterwards carried into effect by the Congress of Vienna, which determined the union of Belgium to Holland, and confirmed the freedom of the navigation of the Rhine, as a condition annexed to this augmentation of territory which had been accepted by the government of the Netherlands. The right to the free navigation of the river, it was said, draws after it, by necessary implication, the innocent use of the different waters which unite it with the sea; and the expression 'to the sea' was, in this respect, equivalent to the term 'into the sea,' since the pretension of the Netherlands to levy unlimited duties upon its principal passage into the sea would render wholly useless to other States the privilege of navigating the river within the Dutch territory.(a)

§ 199. After a long and tedious negotiation, this question was finally settled by the convention concluded at Mayence, the 31st of March, 1831, between all the riparian States of the Rhine, by which the navigation of the river was declared free from the point where it

(a) Annual Register for 1826, lxviii. 259-363.

becomes navigable into the sea, (*bis in die See*,) including its two principal outlets or mouths in the kingdom of the Netherlands, the Leck and the Waal, passing by Rotterdam and Briel through the first-named watercourse, and by Dordrecht and Helvoetsluys through the latter, with the use of the artificial communication by the canal of Voorne with Helvoetsluys. By the terms [279] of this treaty the government of the Netherlands stipulates, in case the passages by the main sea by Briel or Helvoetsluys should at any time become innavigable, through natural or artificial causes, to indicate other watercourses for the navigation and commerce of the riparian States, equal in convenience to those which may be open to the navigation and commerce of its own subjects. The convention also provides minute regulations of police and fixed toll-duties on vessels and merchandise passing through the Netherlands territory to or from the sea, and also by the different ports of the upper riparian States on the Rhine.(a)

Navigation
of the
Mississippi.

§ 200. By the treaty of peace concluded at Paris, in 1763, between France, Spain, and Great Britain, the province of Canada was ceded to Great Britain by France, and that of Florida to the same power by Spain, and the boundary between the French and British possessions in North America, was ascertained by a line drawn through the middle of the river Mississippi from its source to the Iberville, and from thence through the latter river and the lakes of Maurepas and Pontchartrain to the sea. The right of navigating the Mississippi was at the same time secured to the subjects of Great Britain from its source to the sea, and the passages in and out of its mouth, without being stopped, or visited, or subjected to the payment of any duty whatsoever. The province of Louisiana was soon afterwards ceded by France to Spain; and by the treaty of Paris, 1783, Florida was retroceded to Spain by Great Britain. The independence of the United States was acknowledged, and the right of navigating the Mississippi was secured to the citizens of the United States and the subjects of Great Britain by the separate treaty between these powers. But Spain having become thus possessed of both banks of the Mississippi at its mouth, and a considerable distance above its mouth, claimed its exclusive navigation below the point where the southern boundary of the United States struck the river. This claim was resisted, and the right to participate in the navigation of the river from its source to the sea was insisted on by the United States, under the treaties of 1763 and 1783, as well as by the law of nature and nations. The dispute was terminated by the treaty of San Lorenzo el Real, in 1795, by the 4th article of which His Catholic Majesty agreed that the navigation of the Mississippi, in [280] its whole breadth, from its source to the ocean, should be free to the citizens of the United States; and by the 22d article, they were permitted to deposit their

(a) Martens, Nouveau Recueil, tom. ix. p. 252.

goods at the port of New Orleans, and to export them from thence, without paying any other duty than the hire of the warehouses. The subsequent acquisition of Louisiana and Florida by the United States having included within their territory the whole river from its source to the Gulf of Mexico, and the stipulation in the treaty of 1783, securing to British subjects a right to participate in its navigation, not having been renewed by the treaty of Ghent, in 1814, the right of navigating the Mississippi is now vested exclusively in the United States.

§ 201. The right of the United States to participate with Spain in the navigation of the river Mississippi, was rested by the American government on the sentiment written in deep characters on the heart of man, that the ocean is free to all men, and its rivers to all their inhabitants. This natural right was found to be universally acknowledged and protected in all tracts of country, united under the same political society, by laying the navigable rivers open to all their inhabitants. When these rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream was in any case obstructed, it was an act of force by a stronger society against a weaker, condemned by the judgment of mankind. The then recent case of the attempt of the Emperor Joseph II. to open the navigation of the Scheldt from Antwerp to the sea, was considered as a striking proof of the general union of sentiment on this point, as it was believed that Amsterdam had scarcely an advocate out of Holland, and even there her pretensions were advocated on the ground of treaties, and not of natural right. This sentiment of right in favor of the upper inhabitants, must become stronger in the proportion which their extent of country bears to the lower. The United States held 600,000 square miles of inhabitable territory on the Mississippi and its branches, and this river, with its branches, afforded many thousands of miles of navigable waters penetrating this territory in all its parts. The inhabitable territory of Spain below their boundary and bordering on the river, which alone could pretend any fear of being incommoded by their use of the river, was not the thousandth part of that extent. This vast portion of the territory of the United States had no other outlet for its productions, and these productions were of the bulkiest kind. And, in truth, their passage down the river might not only be innocent, as to the Spanish subjects on the river, but would not fail to enrich them far beyond their actual condition. The real interests, then, of the inhabitants, upper and lower, concurred in fact with their respective rights.

§ 202. If the appeal was to the law of nature and nations, as expressed by writers on the subject, it was agreed by them, that even if the river, where it passes between Florida and Louisiana, were the

exclusive right of Spain, still an innocent passage along it was a natural right in those inhabiting its borders above. It would, indeed, be what those writers call an *imperfect* right, because the modification of its exercise depends, in a considerable degree, on the conveniency of the nation through which they were to pass. But it was still a *right*, as real as any other right however well defined; and were it to be refused, or to be so shackled by regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to us, it would then be an injury, of which we should be entitled to demand redress. The right of the upper inhabitants to use this navigation was the counterpart to that of those possessing the shores below, and founded in the same natural relations with the soil and water. And the line at which their respective rights met was to be advanced or withdrawn, so as to equalize the inconveniences resulting to each party from the exercise of the right by the other. This estimate was to be fairly made with a mutual disposition to make equal sacrifices, and the numbers on each side ought to have their due weight in the estimate. Spain held so very small a tract of habitable land on either side below our boundary, that it might in fact be considered as a strait in the sea; for though it was eighty leagues from our southern boundary to the mouth of the river, yet it was only here and there in spots and slips that the land rises above the level of the water in times of inundation. There were then, and ever must be, so few inhabitants on her part of the river, that the freest use of its navigation might be admitted to us without their annoyance.^(a)

It was essential to the interests of both parties that the navigation of the river should be free to both, on the footing on which [282] it was defined by the treaty of Paris, viz., through its whole breadth. The channel of the Mississippi was remarkably winding, crossing and re-crossing perpetually from one side to the other of the general bed of the river. Within the elbows thus made by the channel there was generally an eddy setting upwards, and it was by taking advantage of these eddies, and constantly crossing from one to another of them, that boats were enabled to ascend the river. Without this right the navigation of the whole river would be impracticable both to the Americans and Spaniards.

It was a principle that the right to a thing gives a right to the means without which it could not be used, that is to say, that the means follow the end. Thus a right to navigate a river draws to it a right to moor vessels to its shores, to land on them in cases of distress, or for other necessary purposes, &c. This principle was founded in

(a) The authorities referred to on this head were the following: Grotius, de Jur. bel. ac Pac. lib. ii. cap. 2, §§ 11-13; cap. 3, §§ 7-12. Puffendorf, lib. iii. cap. 3, §§ 3-6. Wolff's Inst. §§ 310-312. Vattel, liv. i. § 292; liv. ii. §§ 123-130.

natural reason, was evidenced by the common sense of mankind, and declared by the writers before quoted.

The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their own citizens, by declaring them public, declared also that the right to the use of the shores was incident to that of the water.^(b) The laws of every country probably did the same. This must have been so understood between France and Great Britain at the treaty of Paris, where a right was ceded to British subjects to navigate the whole river, and expressly that part between the island of New Orleans and the western bank, without stipulating a word about the use of the shores, though both of them belonged then to France, and were to belong immediately to Spain. Had not the use of the shores been considered as incident to that of the water, it would have been expressly stipulated, since its necessity was too obvious to have escaped either party. Accordingly all British subjects used the shores habitually for the purposes necessary to the navigation of the river; and when a Spanish governor undertook at one time to forbid this, and even cut loose the vessels fastened to the shores, a British vessel went immediately, moored itself opposite the town of New Orleans, and set out guards with orders to fire on such as might attempt to disturb her moorings. The governor acquiesced, the right was constantly exercised afterwards, and no interruption ever offered.

[283] This incidental right extends even beyond the shores, when circumstances render it necessary to the exercise of the principal right; as in the case of a vessel damaged, which, as the mere shore could not be a safe deposit for her cargo till she could be repaired, may remove into safe ground off the river. The Roman law was here quoted, too, because it gave a good idea both of the extent and the limitations of this right.^(c)

§ 203. The relative position of the United States and Great Britain in respect to the navigation of the great northern lakes and the river St. Lawrence, appears to be similar to that of the United States and Spain, previously to the cession of Louisiana and Florida, in respect to the Mississippi; the United States being in possession of the southern shores of the lakes and the river St. Lawrence to the point where their northern boundary line strikes the river, and Great Britain, of the northern shores of the lakes and the river in its whole extent to the sea, as well as of the southern banks of the river, from the latitude 45° north to its mouth.

Navigation
of the St.
Lawrence.

The claim of the people of the United States, of a right to navigate

(b) Inst. lib. ii. tit. 1, §§ 1-5.

(c) Mr. Jefferson's Instructions to United States Ministers in Spain, March 18, 1792. Waite's⁽¹⁾ State Papers, x. 135-140.

[1 For Waite's read Wait's.]—G.G.W.

the St. Lawrence to and from the sea, was, in 1826, the subject of discussion between the American and British governments.

On the part of the United States government, this right is rested on the same grounds of natural right and obvious necessity which had formerly been urged in respect to the river Mississippi. The dispute between different European powers respecting the navigation of the Scheldt, in 1784, was also referred to in the correspondence on this subject, and the case of that river was distinguished from that of the St. Lawrence by its peculiar circumstances. Among others, it is known to have been alleged by the Dutch, that the whole course of the two branches of this river which passed within the dominions of Holland was entirely *artificial*; that it owed its existence to the skill and labor of Dutchmen; that its banks had been erected and maintained by them at a great expense. Hence, probably, the motive for that stipulation in the treaty of Westphalia, that the lower Scheldt, with the canals of Sas and Swin, and other mouths of the sea adjoining them, should be kept closed on the side belonging to [284] Holland. But the case of the St. Lawrence was totally different, and the principles on which its free navigation was maintained by the United States had recently received an unequivocal confirmation in the solemn act of the principal States of Europe. In the treaties concluded at the Congress of Vienna, it had been stipulated that the navigation of the Rhine, the Neckar, the Mayn, the Moselle, the Maese, and the Scheldt, should be free to all nations. These stipulations, to which Great Britain was a party, might be considered as an indication of the present judgment of Europe upon the general question. The importance of the present claim might be estimated by the fact, that the inhabitants of at least eight States of the American Union, besides the territory of Michigan, had an immediate interest in it, besides the prospective interests of other parts connected with this river and the inland seas through which it communicates with the ocean. The right of this great and growing population to the use of this its only natural outlet to the ocean, was supported by the same principles and authorities which had been urged by Mr. Jefferson in the negotiation with Spain respecting the navigation of the river Mississippi. The present claim was also fortified by the consideration that this navigation was, before the war of the American Revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the mother country and the colonies in the war of 1756. The claim of the United States to the free navigation of the St. Lawrence was of the same nature with that of Great Britain to the navigation of the Mississippi, as recognized by the 7th article of the treaty of Paris, 1763, when the mouth and lower shores of that river were held by another power. The claim, whilst necessary to the United

States, was not injurious to Great Britain, nor could it violate any of her just rights.^(a)

§ 204. On the part of the British government, the claim was considered as involving the question whether a *perfect* right to the free navigation of the river St. Lawrence could be maintained according to the principles and practice of the law of nations. The St. Lawrence, continued.

The liberty of passage to be enjoyed by one nation through the dominions of another was treated by the most eminent writers on [285] public law as a qualified, occasional exception to the paramount rights of property. They made no distinction between the right of passage by a river, flowing from the possessions of one nation through those of another, to the ocean, and the same right to be enjoyed by means of any highway, whether of land or water, generally accessible to the inhabitants of the earth. The right of passage, then, must hold good for other purposes, besides those of trade,—for objects of war as well as for objects of peace,—for all nations, no less than for any nation in particular, and be attached to artificial as well as to natural highways. The principle could not, therefore, be insisted on by the American government, unless it was prepared to apply the same principle by reciprocity, in favor of British subjects, to the navigation of the Mississippi and the Hudson, access to which from Canada might be obtained by a few miles of land-carriage, or by the artificial communications created by the canals of New York and Ohio. Hence the necessity which has been felt by the writers on public law, of controlling the operation of a principle so extensive and dangerous, by restricting the right of transit to purposes of *innocent* utility, to be exclusively determined by the local sovereign. Hence the right in question is termed by them an *imperfect* right. But there was nothing in these writers, or in the stipulations of the treaties of Vienna, respecting the navigation of the great rivers of Germany, to countenance the American doctrine of an absolute, natural right. These stipulations were the result of mutual consent, founded on considerations of mutual interest growing out of the relative situation of the different States concerned in this navigation. The same observation would apply to the various conventional regulations, which had been, at different periods, applied to the navigation of the river Mississippi. As to any supposed right derived from the simultaneous acquisition of the St. Lawrence by the British and American people, it could not be allowed to have survived the treaty of 1783, by which the independence of the United States was acknowledged, and a partition of the British

(a) American Paper on the Navigation of the St. Lawrence: Congress. Documents, Session 1827-1828, No. 43, p. 34.⁽¹⁾

[¹ For Congress. Documents, Session 1827-1828, No. 43 read H. R. Doc. 20th Cong. 1st sess. Ex. No. 43.]—G.G.W.

dominions in North America was made between the new government and that of the mother country.(a)

The St.
Lawrence,
continued.

§ 205. To this argument it was replied, on the part of the United States, that, if the St. Lawrence were regarded as a *strait* connecting navigable seas, as it ought properly [286] to be, there would be less controversy. The principle on which the right to navigate straits depends, is, that they are accessorial to those seas which they unite, and the right of navigating which is not exclusive, but common to all nations; the right to navigate the seas drawing after it that of passing the straits. The United States and Great Britain have between them the exclusive right of navigating the lakes. The St. Lawrence connects them with the ocean. The right to navigate both (the lakes and the ocean) includes that of passing from one to the other through the natural link. Was it then reasonable or just that one of the two co-proprietors of the lakes should altogether exclude his associate from the use of a common bounty of nature, necessary to the full enjoyment of them? The distinction between the right of passage, claimed by one nation through the territories of another, on land, and that on navigable water, though not always clearly marked by the writers on public law, has a manifest existence in the nature of things. In the former case, the passage can hardly ever take place, especially if it be of numerous bodies, without some detriment or inconvenience to the State whose territory is traversed. But in the case of a passage on water no such injury is sustained. The American government did not mean to contend for any principle the benefit of which, in analogous circumstances, it would deny to Great Britain. If, therefore, in the further progress of discovery, a connection should be developed between the river Mississippi and Upper Canada, similar to that which exists between the United States and the St. Lawrence, the American government would be always ready to apply, in respect to the Mississippi, the same principles it contended for in respect to the St. Lawrence. But the case of rivers, which rise and debouch altogether within the limits of the same nation, ought not to be confounded with those which, having their sources and navigable portions of their streams in States above, finally discharge themselves within the limits of other States below. In the former case, the question as to opening the navigation to other nations, depended upon the same considerations which might influence the regulation of other commercial intercourse with foreign States, and was to be exclusively determined by the local sovereign. But in respect to the latter the free navigation of the river was a natural right in the upper inhabitants, of which they could not be entirely

(a) British Paper on the Navigation of the St. Lawrence. Session 1827-1828, No. 43, p. 41.⁽¹⁾

[¹ For Session 1827-1828, No. 43 read H. R. Doc. 20th Cong. 1st sess. Ex. No. 43.]—G.G.W.

deprived by the arbitrary caprice of the lower State. Nor was the fact of [287] subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect to the navigation of the European rivers, sufficient to prove that the origin of the right was conventional, and not natural. It often happened to be highly convenient, if not sometimes indispensable, to avoid controversies by prescribing certain rules for the enjoyment of a natural right. The law of nature, though sufficiently intelligible in its great outlines and general purposes, does not always reach every minute detail which is called for by the complicated wants and varieties of modern navigation and commerce. Hence the right of navigating the ocean itself, in many instances, principally incident to a state of war, is subjected, by innumerable treaties, to various regulations. These regulations—the transactions of Vienna, and other analogous stipulations—should be regarded only as the spontaneous homage of man to the paramount Lawgiver of the universe, by delivering his great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected.^(a)¹¹⁸

(a) Mr. Secretary Clay's Letter to Mr. Gallatin, June 19, 1826. Session 1827–1828, No. 43, p. 18.⁽¹⁾

^[118] *Navigaton of the St. Lawrence, the Great Lakes, and the South American Rivers.*—Art. IV of the Reciprocity treaty of 5th June, 1854, now terminated (see note 110, *ante*), gave to the inhabitants of the United States the right to navigate the St. Lawrence, and the canals in Canada used as means of communication between the great lakes and the Atlantic, as freely as British subjects, and upon the same terms as to tolls and other assessments. While this privilege remained in citizens of the United States, British subjects were to have a corresponding right to navigate Lake Michigan. Great Britain might at any time suspend this privilege, upon notice, in which event her right to navigate Lake Michigan terminated; and the United States might further suspend the operation, so far as Canada was affected thereby, of Art. III of the treaty, admitting certain articles, the growth and produce of British provinces, into the United States duty free. This treaty further exempted from export-duty lumber cut in that part of Maine watered by the St. John and its tributaries, and floated down that river and exported from New Brunswick to the United States. (U. S. Laws, x. 199 *t.*)

The treaty of 10th July, 1853, between the United States and the Argentine Confederation, opens the Uruguay and Parana to merchant vessels of all nations, subject only to conditions established by the treaty, or hereafter to be sanctioned by the Confederation. It allows vessels to load and unload in ports open for the purpose; and the Confederation agrees to establish a uniform system of duties, and harbor, pilotage, and police dues, on all its waters. The United States is to be put upon the basis of the most favored nations as to trade; and Brazil, Bolivia, Paraguay, and Uruguay are to become parties to the treaty, if they will extend its provisions to those parts of the rivers Paraguay, Uruguay, and Parana in which they have fluvial rights. (U. S. Laws, x. 233 *t.*)

By a treaty of 4th February, 1859, between the United States and the Republic of [288] Paraguay, Paraguay concedes to the merchant-vessels of the United States the free navigation of the river Paraguay, within its dominions, and to the extent of its own authority over the same. (U. S. Laws, xii. 117 *t.*)

By a treaty of May 13, 1858, between the United States and Bolivia, the latter country declares, that, 'in accordance with fixed principles of international law, it⁽¹¹⁾ regards the Amazon and La Plata, with their tributaries, as highways or channels opened by nature to⁽¹¹¹⁾ the commerce of all nations,' and invites commerce of all nations to her ports on the tributaries of

[¹ For Session 1827–1828, No. 43 read H. R. Doc. 20th Cong. 1st sess. Ex. No. 43.]—G.G.W.

[¹¹ For it read Bolivia.]—G.G.W.

[¹¹¹ For to read for.]—G.G.W.

those rivers; and declares that all places on the Bolivian tributaries of the Amazon or La Plata rivers, accessible by merchant-vessels of the United States, shall be considered as ports open to trade within the terms of the treaty, the provisions of which establish reciprocity of trade between the two countries. (U. S. Laws, xii. 291 *t.*)

By a law passed on the 26th November, 1853, Ecuador declares free the navigation of the rivers and tributaries within the republic, including the Ecuadorian tributaries of the Amazon.

As to the Peruvian tributaries of the Amazon, a controversy arose between the United States and Peru. By the treaty between those powers of 26th July, 1851, it is agreed that there shall be 'reciprocal liberty of commerce and navigation between their respective territories,' and that 'the citizens of either may frequent with their vessels all the coasts, ports, and places of the other where foreign commerce is permitted,' and shall have 'full liberty to trade in all parts of the territories of either;' and each agrees 'not to grant any favor, privilege, or immunity whatever, in matters of commerce and navigation, to other nations which shall not immediately⁽¹⁾ be extended to the citizens of the other contracting party.' On the 23d October following, Peru made a treaty with Brazil, to regulate the navigation of the Amazon and its tributaries, in which it is agreed that vessels of either country, passing to or from portions of the other on that river or its tributaries, shall be subject only to reciprocal duties, such as either nation lays on its own products. The United States contended that this treaty came within the operation of the reciprocal clause of the treaty of the 26th July, 1851, and gave to our commerce the same rights in the Peruvian tributaries of the Amazon with Brazilian commerce. This construction has been denied by Peru; in which denial she has been sustained by Brazil, which has objected to the passage of commerce of the United States through the Amazon. (U. S. Laws, x. 28 *t.*)

By the treaty of Dec. 30, 1853, between the United States and Mexico, navigation is made free to vessels of the United States to and from their own territory, through the Colorado and the Gulf of California, and through the Mexican part of the Rio Grande below latitude 31° 47' 30". (U. S. Laws. x. 123 *t.*)—D.

[¹ *For shall not immediately read shall not also immediately.*]—G.G.W.

[289] PART THIRD

INTERNATIONAL RIGHTS OF STATES IN THEIR PACIFIC RELATIONS

CHAPTER I

RIGHTS OF LEGATION

§ 206. THERE is no circumstance which marks more distinctly the progress of modern civilization, than the institution of permanent diplomatic missions between different States. The rights of ambassadors were known, and, in some degree, respected by the classic nations of antiquity. During the Middle Ages they were less distinctly recognized, and it was not until the seventeenth century that they were firmly established. The institution of resident permanent legations at all the European courts took place subsequently to the peace of Westphalia, and was rendered expedient by the increasing interest of the different States in each other's affairs, growing out of more extensive commercial and political relations, and more refined speculations respecting the balance of power, giving them the right of mutual inspection as to all transactions by which that balance might be affected. Hence, the rights of legation have become definitely ascertained and incorporated into the international code.

Usage of permanent diplomatic missions.

§ 207. Every independent State has a right to send public ministers to, and receive ministers from, any other sovereign State with which it desires to maintain the relations of peace and amity. No State, strictly speaking, is obliged, by the positive law of nations, to send or receive public ministers, although the usage and comity of nations seem to have [290] established a sort of reciprocal duty in this respect. It is evident, however, that this cannot be more than an imperfect obligation, and must be modified by the nature and importance of the relations to be maintained between different States by means of diplomatic intercourse. (a)

Right to send, and obligation to receive, public ministers.

§ 208. How far the rights of legation belong to dependent or semi-sovereign States, must depend upon the nature of their peculiar relation to the superior State under whose protection they are placed. Thus, by the treaty concluded at Kainardgi, in 1774, between Russia and the Porte, the provinces of Moldavia and Wallachia, placed under the protection of the former power, have the right of sending *chargés d'affaires* of the Greek communion to represent them at the court of Constantinople. (a)

Rights of legation, to what States belonging.

(a) Vattel, *Droit des Gens*, liv. iv. ch. 5, §§ 55-65. Rutherford's *Inst.* vol. ii. b. ii. ch. 9, § 20. Martens, *Précis du Droit de Gens Moderne de l'Europe*, liv. vii. ch. 1, §§ 187-190.

(a) Vattel, liv. iv. ch. 5, § 60. Klüber, *Droit des Gens Moderne de l'Europe*, st. 2, ⁽¹⁾ tit. 2, ch. 3, § 175. Merlin, *Répertoire*, tit. *Ministre Publique*, sect. ii. § 1, Nos. 3, 4.

[1 For st. 2 read Pt. 2.]—G.G.W.

So also of confederated States: their right of sending public ministers to each other, or to foreign States, depends upon the peculiar nature and constitution of the union by which they are bound together. Under the constitution of the former German Empire, and that of the present Germanic Confederation, this right is preserved to all the princes and States composing the federal union. Such was also the former Constitution of the United Provinces of the Low Countries, and such is now that of the Swiss Confederation. By the Constitution of the United States of America every State is expressly forbidden from entering, without the consent of Congress, into any treaty, alliance, or confederation, with any other State of the Union, or with a foreign State, or from entering, without the same consent, into any agreement or compact with another State, or with a foreign power. The original power of sending and receiving public ministers is essentially modified, if it be not entirely taken away, by this prohibition.^(b)¹¹⁹

How affected
by civil war
or contest
for the
sovereignty.

[291] § 209. The question, to what department of the government belongs the right of sending and receiving public ministers, also depends upon the municipal constitution of the State. In monarchies, whether absolute or constitutional, this prerogative usually resides in the sovereign. In republics it is vested either in the chief magistrate, or in a senate or council, conjointly with or exclusive of such magistrate. In the case of a revolution, civil war, or other contest for the sovereignty, although, strictly speaking, the nation has the exclusive right of determining in whom the legitimate authority of the country resides, yet foreign States must of necessity judge for themselves whether they will recognize the government *de facto* by sending to, and receiving ambassadors from it; or whether they will continue their accustomed diplomatic relations with the prince whom they choose to regard as the legitimate sovereign; or suspend altogether these relations with the nation in question. So, also, where an empire is severed by the revolt of a province, or colony declaring and maintaining its independence, foreign States are governed by expediency in determining whether they will commence diplomatic intercourse with the new State, or wait for its recognition by the metropolitan country.^(a)¹²⁰

(b) Heffter, *Europ. Völker*. § 200. Merlin, *Répertoire*, tit. *Ministre Publique*, sect. ii. § 5.

[¹¹⁹ Constitution of the United States, Art. I, § 10. The Articles of Confederation had the same prohibition (Art. of Confed. § 6); and no State ever exercised such a power, or ever acted as a sovereign, in foreign relations. The Articles of Confederation were adopted during the War of Independence, and were superseded, without interval, by the Constitution; so that none of the colonies or States were ever in a [291] political condition that admitted of their sending and receiving public ministers. The colonies acted together as a political body, in all their international relations, in throwing off their allegiance, and during the War of Independence. It was as a confederation that their independence was achieved, and the confederation passed directly into a supreme government. See note 32, *ante*, The United States a Supreme Government.]—D.

(a) *Vide supra*, §§ 22–26. Merlin, *Répertoire*, tit. *Ministre Publique*, sect. ii. § 6.

[¹²⁰ On this subject, see note 16, *ante*, on Recognition of Independence, and note 41, *ante*, on Intervention in Mexico and Recognition of the Empire. See also Mr. Buchanan to Mr. Rush,

For the purpose of avoiding the difficulties which might arise from a formal and positive decision of these questions, diplomatic agents are frequently substituted, who are clothed with the powers, and enjoy the immunities of ministers, though they are not invested with the representative character, nor entitled to diplomatic honors.¹²¹

[292] § 210. As no State is under a *perfect* obligation to receive ministers from another, it may annex such conditions to their reception as it thinks fit; but when once received, they are, in all other respects, entitled to the privileges annexed by the law of nations to their public character. Thus some governments have established it as a rule not to receive one of their own native subjects as a minister from a foreign power; and a government may receive one of its own subjects, under the expressed condition that he shall continue amenable to the local laws and jurisdiction. So, also, one court may absolutely refuse to receive a particular individual as minister from another court, alleging the motives on which such refusal is grounded.^(a)

Conditional
reception of
foreign
ministers.

§ 211. The primitive law of nations makes no other distinction between the different classes of public ministers, than that which arises from the nature of their functions; but the modern usage of Europe having introduced into the voluntary law of nations certain distinctions in this respect, which, for want of exact definition, became the perpetual source of controversies, uniform rules were at last adopted by the Congress of Vienna, and that of Aix-la-Chapelle, which put an end to those disputes. By the rules thus established, public ministers are divided into the four following classes:

Classification
of public
ministers.

1. Ambassadors, and papal legates or nuncios.
2. Envoys, ministers, or others accredited to sovereigns (*auprès des souverains*).

of 31st March, 1848; Mr. Webster to Mr. Rives, of Jan. 12, 1852; Mr. Everett to Mr. Rives, of 17th February, 1863.⁽¹⁾—D.

^[121] Where a revolution or forcible change of governments has occurred, a minister who had been accredited to the country, and duly received by the former government, and remains over, will usually enjoy the immunities of a public minister, although his own State may not have recognized the new government as the real sovereignty. It is not likely that objections will come from that quarter. But it may well be questioned [292] whether a State can claim, as a right under the law of nations, that its agent shall 'enjoy the immunities,' and be treated as 'clothed with the powers of a public minister,' when it declines to 'invest him with the representative character,' or to recognize the independence or lawfulness of the government to which he is sent. The rule would seem to be this: if the revolutionary State chooses to receive this restricted diplomatic agent, it must accord to him the immunities appropriate to the functions he is recognized as discharging. As to holding official intercourse with agents of a party engaged in a revolution against a State with which the United States holds free and friendly diplomatic intercourse, see Mr. Seward's memoranda of March 13 and July 17, 1865, cited at length in note 41, *ante*, on Intervention in Mexico and Recognition of the Empire. See also instructions of Earl Russell to Lord Lyons of 23d January, 1862. Parl. Papers, North America, No. 5.]—D.

(a) Bynkershoek, de Foro Legatorum, cap. 11, § 10. Martens, Manuel Diplomatique, ch. 1, § 6. Merlin, Répertoire, tit. *Ministre Publique*, sect. iii. § 5.

[¹ For 1863 read 1853.]—G.G.W.

3. Ministers resident accredited to sovereigns.

[293] 4. Chargés d'affaires accredited to the minister of foreign affairs.^(a)

Ambassadors.

§ 212. Ambassadors and other public ministers of the first class are exclusively entitled to what is called the *representative* character, being considered as peculiarly representing the sovereign or State by whom they are delegated, and entitled to the same honors to which their constituent would be entitled, were he personally present. This must, however, be taken in a general sense, as indicating the sort of honors to which they are entitled; but the exact ceremonial to be observed towards this class of ministers depends upon usage, which has fluctuated at different periods of European history. There is a slight shade of difference between ambassadors ordinary and extraordinary; the former designation being exclusively applied to those sent on permanent missions, the latter to those employed on a particular or extraordinary occasion, though it is sometimes extended to those residing at a foreign court for an indeterminate period.^(a)

The right of sending ambassadors is exclusively confined to crowned heads, the great republics, and other States entitled to royal honors.^(b)

Ministers of the second class.

§ 213. All other public ministers are destitute of that particular character which is supposed to be derived from representing generally

(a) The *recess* of the Congress of Vienna of the 19th of March, 1815, provides:—

'ART. 1. Les employés diplomatiques sont partagés en trois classes:

'Celle des ambassadeurs, légats ou nonces;

'Celle des envoyés, ministres, ou autres accrédités auprès des souverains;

'Celle des chargés d'affaires accrédités auprès des ministres chargés des affaires étrangères.

'ART. 2. Les ambassadeurs, légats ou nonces, ont seuls le caractère représentatif.

'ART. 3. Les employés diplomatiques en mission extraordinaire, n'ont, à ce titre, aucune supériorité de rang.

'ART. 4. Les employés diplomatiques prendront rang, entre eux, dans chaque classe, d'après la date de la notification officielle de leur arrivée.

'Le présent règlement⁽¹⁾ n'apportera aucune innovation relativement aux représentants du Pape.

'ART. 5. Il sera déterminé dans chaque état un mode uniforme pour la réception des employés diplomatiques de chaque classe.

'ART. 6. Les liens de parenté ou d'alliance de famille entre les cours, ne donnent aucun rang à leurs employés diplomatiques.

'Il en est de même des alliances politiques.

'ART. 7. Dans les actes ou traités entre plusieurs puissances, qui admettent l'alternat, le sort décidera, entre les ministres, de l'ordre qui devra être suivi dans les signatures.'

The protocol of the Congress of Aix-la-Chapelle of the 21st November, 1818, declares:

'Pour éviter les discussions désagréables qui pourraient avoir lieu à l'avenir sur un point d'étiquette diplomatique, que l'annexe du *recess* de Vienne, par lequel les questions de rang ont été réglées, ne parait pas avoir prévu, il est arrêté entres⁽¹⁾ les cinq cours, que les ministres résidens, accrédités auprès d'elles formeront, par rapport à leur rang, une classe intermédiaire entre les ministres du second ordre et les chargés d'affaires.'

(a) Vattel, *Droit des Gens*, liv. iv. ch. 6, §§ 70-79. Martens, *Précis du Droit des Gens Moderne de l'Europe*, liv. vii. ch. 9, § 192. Martens, *Manuel Diplomatique*, ch. 1, § 9.

(b) Martens, *Précis*, &c., liv. vii. ch. 2, § 198. *Vide ante*, § 153.

[¹ For *règlement* read *règlement*.]—G.G.W.

[¹ For *entres* read *entre*.]—G.G.W.

the person and dignity of the sovereign. They represent him only in respect to the particular business committed to their charge at the court to which they are accredited.(a)

Ministers of the second class are envoys, envoys extraordinary, ministers plenipotentiary, envoys extraordinary and ministers plenipotentiary, and internuncios of the Pope.(b)

§ 214. So far as the relative rank of diplomatic agents may be determined by the nature of their respective functions, there is no essential difference between public ministers of the first class and those of the second. Both are accredited by the sovereign, or supreme executive power of the State, to a foreign sovereign. The distinction between ambassadors and envoys was originally grounded upon the supposition, that the former are authorized to negotiate directly with the sovereign himself; whilst the latter, although accredited to him, are only authorized to treat with the minister of foreign affairs or other person empowered by the sovereign. The authority to treat directly with the sovereign was supposed to involve a higher degree of confidence, and to entitle the person on whom it was conferred, to the honors due to the highest rank of public ministers. This distinction, so far as it is founded upon any essential difference between the functions of the two classes of diplomatic agents, is more apparent than real. The usage of all times, and especially the more recent times, authorizes public ministers of every class to confer, on all suitable occasions, with the sovereign at whose court they are accredited, on the political relations [295] between the two States. But even at those periods when the etiquette of European courts confined this privilege to ambassadors, such verbal conferences with the sovereign were never considered as binding official acts. Negotiations were then, as now, conducted and concluded with the minister of foreign affairs, and it is through him that the determinations of the sovereign are made known to foreign ministers of every class. If this observation be applicable as between States, according to whose constitutions of government negotiations may, under certain circumstances, be conducted directly between their respective sovereigns, it is still more applicable to representative governments, whether constitutional monarchies or republics. In the former, the sovereign acts, or is supposed to act, only through his responsible ministers, and can only bind the State and pledge the national faith through their agency. In the latter, the supreme executive magistrate cannot be supposed to have any relations with a foreign sovereign, such as would require or authorize direct negotiations between them respecting the mutual interests of the two States.(a)¹²²

Diplomatic
precedence.

(a) Martens, *Manuel Diplomatique*, ch. 1, § 10.

(b) *Ibid.* ch. 1, § 10.

(a) Pinheiro-Ferreira, *Notes to Martens, Précis du Droit des Gens*, tom. ii.: Notes 12, 14.

[¹²² In the United States, it is the settled practice for all communications of a business

¹ Ministers of the third class. § 215. In the third class are included ministers, ministers resident, residents, and ministers chargés d'affaires, accredited to sovereigns.(a)

Chargés d'affaires, accredited to the ministers of foreign affairs of the court at which they reside, are either chargés d'affaires *ad hoc*, who are originally sent and accredited by their governments, [296] or chargés d'affaires *per interim*, substituted in the place of the minister of their respective nations during his absence.(b)

According to the rule prescribed by the Congress of Vienna, and which has since been generally adopted, public ministers take rank between themselves, in each class, according to the date of the official notification of their arrival at the court to which they are accredited.(c)

The same decision of the Congress of Vienna has also abolished all distinctions of rank between public ministers, arising from consanguinity and family or political relations between their different courts.(d)

A State, which has a right to send public ministers of different classes, may determine for itself what rank it chooses to confer upon its diplomatic agents; but usage generally requires that those who maintain permanent missions near the government of each other should send and receive ministers of equal rank. One minister may represent his sovereign at different courts, and a State may send several ministers to the same court. A minister or ministers may also have full powers to treat with foreign States, as at a Congress of different nations, without being accredited to any particular court.(e)

(Consuls and commercial agents. § 216. Consuls, and other commercial agents, not being accredited to the sovereign or minister of foreign affairs, are not, in general, considered as public ministers; but the consuls maintained by the Christian Powers of Europe and America near the Barbary States are accredited and treated as public ministers.(a)

Letters of credence. § 217. Every diplomatic agent, in order to be received in that character by foreign ministers to be made to the Secretary of State, and none to the President. This was settled in the case of M. Genet, the minister of the French Republic, who attempted to address President Washington directly with complaints as to his official conduct in relation to France. It is also settled, that messages from the President to Congress, as well as debates in Congress, are not proper subjects for notice by a foreign minister in correspondence with the Department of State. Mr. Jefferson to M. Genet, Aug. 19, 1793. Mr. Forsyth to Señ. Castillo, Dec. 16, 1835. Mr. Buchanan to Señ. de la Rosa, Feb. 15, 1849. Mr. Webster to M. Hülsemann, Dec. 21, 1850. Mr. Webster to Señ. de la Rosa, Feb. 21, 1851. Mr. Webster, in the case of M. Hülsemann, the Austrian Chargé d'Affaires, took the ground, that, as Chargé d'Affaires, he not only could not hold any direct intercourse on public affairs with the President, but, as matter of strict right, was not entitled to be presented to him. Letter of June 8, 1852.]—D.

(a) Martens, Précis, &c., liv. vii. ch. 2, § 194.

(b) Martens, Manuel Diplomatique, ch. i, § 11.

(c) Recez du Congrès de Vienne du 19 Mars, 1815, art. 4.

(d) Ibid. art. 6.

(e) Martens, Précis, &c., liv. vii. ch. 2, §§ 199-204.

(a) Bynkershoek, de Foro Legatorum, cap. 10, §§ 4-6. Martens, Manuel Diplomatique, ch. i, § 13. Vattel, liv. ii. ch. 2, § 34. Wicquefort, de l'Ambassadeur, liv. i. § 1⁽¹⁾, p. 63.

[¹ For § 1 read § 5.]—G.G.W.

character, and to enjoy the privileges and honors attached to his rank, must be furnished with a letter of credence. In the case of an ambassador, envoy, or minister, of either of the three first classes, this letter of credence is addressed by the sovereign, or other chief magistrate of his own State, to the sovereign [297] or State to whom the minister is delegated. In the case of a *chargé d'affaires*, it is addressed by the secretary, or minister of state charged with the department of foreign affairs, to the minister of foreign affairs of the other government. It may be in the form of a *cabinet letter*, but is more generally in that of a *letter of council*. If the latter, it is signed by the sovereign or chief magistrate, and sealed with the great seal of State. The minister is furnished with an authenticated copy, to be delivered to the minister of foreign affairs, on asking an audience for the purpose of delivering the original to the sovereign, or other chief magistrate of the State, to whom he is sent. The letter of credence states the general object of his mission, and requests that full faith and credit may be given to what he shall say on the part of his court.(a)

§ 218. The full power, authorizing the minister to negotiate, may Full power. be inserted in the letter of credence, but it is more usually drawn up in the form of letters-patent. In general, ministers sent to a Congress are not provided with a letter of credence, but only with a full power, of which they reciprocally exchange copies with each other, or deposit them in the hands of the mediating power or presiding minister.(a)

§ 219. The instructions of the minister are for his own direction Instructions. only, and not to be communicated to the government to which he is accredited, unless he is ordered by his own government to communicate them *in extenso*, or partially; or unless, in the exercise of his discretion, he deems it expedient to make such a communication.(a)¹²³

§ 220. A public minister, proceeding to his destined post in time Passport. of peace, requires no other protection than a passport from his own government. In time of war, he must be provided with a safe-conduct or passport, from the government of [298] the State with which his own country is in hostility, to enable him to travel securely through its territories.(a)¹²⁴

(a) Martens, Précis, &c., liv. vii. ch. 3, § 202. Wicquefort, de l'Ambassadeur, liv. i. § 15.

(a) Wicquefort, liv. i. § 16. Martens, Précis, &c., liv. vii. ch. 3, § 204. Manuel Diplomatique, ch. 2, § 17.

(a) Manuel Diplomatique, ch. 2, § 16.

[¹²³ It is understood that a Minister of Foreign Affairs may decline to hear a despatch, or other written communication, read to him by a diplomatic agent, unless a copy is left with him. The reason is, that it puts him to the disadvantage of being obliged to trust to his memory, while the other party to the interview has the writing. In case of verbal communications, the two parties are on an equality.]-D.

(a) Vattel, liv. iv. ch. 7, § 85. Manuel Diplomatique, ch. 2, § 19. Flassan, Histoire de la Diplomatie Française, tom. v. p. 246.

[¹²⁴ *Passports*.—The theory and practice respecting passports to private citizens in time of peace seems to be this: each nation, as part of its internal system, may withhold the right

Duties of
a public
minister, on
arriving at
his post.

§ 221. It is the duty of every public minister, on arriving at his destined post, to notify his arrival to the minister of foreign affairs. If the foreign minister is of the first class, this notification is usually communicated by a secretary of embassy or legation, or other person attached to the mission, who hands to the minister of foreign affairs a copy of the letter of credence, at the same time requesting an audience of the sovereign for his principal. Ministers of the second and third classes generally notify their arrival by letter to the minister of foreign affairs, requesting him to take the orders of [299] the sovereign, as to the delivery of their letters of credence. *Chargés d'affaires*, who are not accredited to the sovereign, notify their arrival in the same manner, at the same time requesting an audience of the minister of foreign affairs for the purpose of delivering their letters of credence.

Audience
of the sove-
reign, or
chief magis-
trate.

§ 222. Ambassadors, and other ministers of the first class, are entitled to a *public* audience of the sovereign; but this ceremony is not necessary to enable them to enter on their functions, and, together with the ceremony of the *solemn entry*, which was formerly practised with respect to this class of ministers, is now usually dispensed with, and they are received in a *private* audience, in the same manner as other ministers. At this audience the letter of credence is delivered, and the minister pronounces a complimentary discourse, to which the sovereign replies. In republican States, the foreign minister is received in a simi-

of transit through its territory. Permissions to foreigners to pass through it are properly passports; and, in strictness, a foreigner would be obliged to obtain a new passport at the boundaries of each nationality, and each national authority might subject him to an examination to ascertain his character and citizenship. To avoid these inconveniences, a system is adopted by which a citizen, leaving his own country for another, obtains from his own government what is called a passport, and is so, as respects a right to leave his own country; but, in respect to foreign countries, is rather a certificate of citizenship, with such a description of the person, and usually with his autograph appended, as will serve to identify the bearer, and prevent the document being transferred. The presenting of this at the entrance to a foreign country serves to authenticate and identify the bearer; and the foreign government, instead of granting a passport, gives its assent to the bearer's passing through, in the form of a *visé* upon the document itself. This is especially convenient to the traveller in going through several countries, and enables the local governments to examine and authenticate the person and document at various points, attested by fresh *visés*. Where a person away from home desires a passport or certificate from his own government, one may be given him by the diplomatic agent of that government. Each nation has its rules as to who may give and receive these passports; and compliance with them is expected to satisfy foreign governments, in respect to forms. As this passport from one's own government attests to no privilege, but simply certifies private citizenship, it furnishes no exemption from the jurisdiction of the country which receives him. The most that can be claimed for it is, that it is a request to foreign governments to admit the bearer, with the privileges and obligations of a foreign citizen. It would seem plain, that a diplomatic officer abroad could give no passport to any person who did not stand in some relation with that officer's country; if not as a citizen or subject, perhaps as in its employment. An exception to this rule would be irregular, and amount to no more than a request addressed to the courtesy of other governments for reasons which should be stated. Martens, *Précis*, liv. iii. ch. 3, § 84; liv. vii. ch. 5, § 219. Pinheiro-Ferreira, title 'Passport.'¹ U. S. Laws, xi. ch. 127, § 23; and xii. ch. 79, § 23.]—D.

[¹ For Passport read Passeport.]—G.G.W.

lar manner, by the chief executive magistrate or council, charged with the foreign affairs of the nation.(a)

§ 223. The usage of civilized nations has established a certain Diplomatic etiquette. etiquette, to be observed by the members of the diplomatic corps, resident at the same court, towards each other, and towards the members of the government to which they are accredited. The duties which comity requires to be observed, in this respect, belong rather to the code of manners than of laws, and can hardly be made the subject of positive sanction; but there are certain established rules in respect to them, the non-observance of which may be attended with inconvenience in the performance of more serious and important duties. Such are the visits of etiquette, which the diplomatic ceremonial of Europe requires to be rendered and reciprocated, between public ministers resident at the same court.(a)

§ 224. From the moment a public minister enters the territory of the State to which he is sent, during the time of his residence, and until he leaves the country, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. Representing the rights, interests, and dignity of the sovereign or State by whom he is delegated, his person is [300] sacred and inviolable. To give a more lively idea of this complete exemption from the local jurisdiction, the fiction of extra-territoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country, which govern his personal *status* and rights of property, whether derived from contract, inheritance, or testament. His children born abroad are considered as natives. This exemption from the local laws and jurisdiction is founded upon mutual utility, growing out of the necessity that public ministers should be entirely independent of the local authority, in order to fulfil the duties of their mission. The act of sending the minister on the one hand, and of receiving him on the other, amounts to a tacit compact between the two States that he shall be subject only to the authority of his own nation.(a) Privileges of a public minister.

The passports or safe-conduct, granted by his own government in time of peace, or by the government to which he is sent in time of war, are sufficient evidence of his public character for this purpose.(b)

§ 225. This immunity extends, not only to the person of the Exceptions to the general rule of exemption from the local jurisdiction.

(a) Martens, Manuel Diplomatique, ch. 4, §§ 33-36.

(a) Ibid. ch. 4, § 37.

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 1-6. Rutherford's Inst. vol. ii. b. ii. ch. 9, § 20. Wicquefort, de l'Ambassadeur, liv. i. § 27. Bynkershoek, de Foro Legatorum, cap. 5, 8. Vattel, Droit des Gens, liv. iv. ch. 7, §§ 81-125. Martens, Précis, &c., liv. vii. ch. 5, §§ 214-218. Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. 2, p. 203.⁽¹⁾ Foelix, Droit International Privé, § 184. Wheaton's Hist. Law of Nations, 237-243.

(b) Vattel, liv. iv. ch. 7, § 83.

[¹ For p. 203 read § 203.]—G.G.W.

minister, but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides.(a)

The minister's person is, in general, entirely exempt both from the civil and criminal jurisdiction of the country where he resides. To this general exemption there may be the following exceptions:

1. This exemption from the jurisdiction of the local tribunals and authorities does not apply to the *contentious* jurisdiction, which [301] may be conferred on those tribunals by the minister voluntarily making himself a party to a suit at law.(b)¹²⁵

2. If he is a citizen or subject of the country to which he is sent, and that country has not renounced its authority over him, he remains still subject to its jurisdiction. But it may be questionable whether his reception as a minister from another power, without any express reservation as to his previous allegiance, ought not to be considered as a renunciation of this claim, since such reception implies a tacit convention between the two States that he shall be entirely exempt from the local jurisdiction.(c)

3. If he is at the same time in the service of the power who receives him as a minister, as sometimes happens among the German courts, he continues still subject to the local jurisdiction.(d)

4. In cases of offences committed by public ministers, affecting the existence and safety of the State where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country.¹²⁶ In all other cases, it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended State to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the State thus offended in proceeding against an ambassador as a public

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, §§ 8, 9. Bynkershoek, de Foro Legatorum, cap. 13, § 5; cap. 15, 20. Vattel, liv. iv. ch. 8, § 113; ch. 9, §§ 117-123. Martens, Précis, &c., liv. vii. ch. 5, §§ 215-227; ch. 9, §§ 234-237. Fœlix, §§ 184-186.

(b) Bynkershoek, cap. 16, §§ 13-15. Vattel, liv. iv. ch. 8, § 111. Martens, Précis, &c., liv. vii. ch. 5, § 216. Merlin, Répertoire, tit. *Ministre Publique*, sect. v. § 4, No. 10.

[¹²⁵ In the trial of Herbert for murder, at Washington, in 1856, the Minister of the Netherlands, who was an important witness to the transaction, refused to appear in court at the request of the United States Government, who admitted his right to decline; and his own government refused to instruct him to appear as a witness, although requested to do so by the government of the United States. His objection was, that, by appearing, he subjected himself to cross-examination and to rules which justice to the respective parties might require the court to enforce. Ex. Doc. Senate, No. 21, 34th Cong. 3d Sess. See note 129, *infra*, on Diplomatic Immunity, for fuller examination of the doctrine of waiving the privilege of exemption.]—D.

(c) Bynkershoek, cap. 11. Vattel, liv. iv. ch. 8, § 112.

(d) Martens, Manuel Diplomatique, ch. 3, § 23.

[¹²⁶ For instances of the enforcement of this rule, see Lord Stanhope's Hist. of England, (1) i. 388, 484.]—D.

[¹ Insert from the Peace of Utrecht after England.]—G.G.W.

enemy, or in inflicting punishment upon his person, if justice should be refused by his own sovereign. But the circumstances which would authorize such a proceeding are hardly capable of precise [302] definition, nor can any general rule be collected from the examples to be found in the history of nations, where public ministers have thrown off their public character, and plotted against the safety of the State to which they were accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity. Grotius distinguishes here between what may be done in the way of self-defence and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as a punishment for a crime after it has been committed, yet this law does not oblige the State to suffer him to use violence without endeavoring to resist it.^(e)¹²⁷

§ 226. The wife and family, servants and suite, of the minister, participate in the inviolability attached to his public character. The secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps, in respect to their exemption from the local jurisdiction.^(a)

Personal exemption extending to his family, secretaries, servants, &c.

The municipal laws of some, and the usages of most nations, require an official list of the domestic servants of foreign ministers to be communicated to the secretary or minister of foreign affairs, in order to entitle them to the benefit of this exemption.^(b)

It follows from the principle of the extra-territoriality of the minister, his family, and other persons attached to the legation, or belonging to his suite, and their exemption from the local laws and jurisdiction of the country where they reside, that the civil and criminal jurisdiction over these persons rests with the minister, to be exercised according to the laws and usages of his own country. In respect to civil jurisdiction, both contentious and voluntary, this rule is, with some exceptions, followed in the practice of nations. But in respect to criminal offences committed by his domestics, [303] although in strictness the minister has a right to try and punish them, the modern usage merely authorizes him to arrest and send them for trial to their own country.¹²⁸ He may, also, in the exercise of his discretion, discharge

(e) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 4. Rutherford's⁽¹⁾ Inst. vol. ii. b. ii. ch. 9, § 20. Bynkershoek, de Foro Competent. Legat.⁽¹¹⁾ cap. 17, 18, 19. Vattel, liv. iv. ch. 7, §§ 94-102. Martens, Précis, &c., liv. vii. ch. 5, § 218. Ward's Hist. of the Law of Nations, ii. ch. 17, 291-334. Wheaton's Hist. Law of Nations, 250-254.

[¹²⁷ See note 129, *infra*, on Diplomatic Immunity.]—D.

(a) Grotius, lib. ii. cap. 18, § 8. Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 120-123. Martens, Précis, &c., liv. vii. ch. 5, § 219; ch. 9, §§ 234-237. Fœlix, § 184, (§ 209, 3^{me} edit.)

(b) Blackstone's Comm. i. ch. 7. U. S. Laws, i. §§ 24-28.

[¹²⁸ Heffter says that a minister in a Christian country has no authority to inflict penalties

[¹ For Rutherford's read Rutherford's.]—G.G.W.

[¹¹ For de Foro Competent. Legat. read de Foro Legatorum.]—G.G.W.

them from his service, or deliver them up for trial under the laws of the State where he resides; as he may renounce any other privilege to which he is entitled by the public law.^(c)¹²⁹

upon his suite, and no jurisdiction to decide controversies of legal rights among them, and between his fellow-citizens residing in the country. (Europ. Völker. § 216.) De Martens, § 215. Mr. Cass, Secretary of State, in a letter to Mr. Fay, the United States Minister at Berne, of Nov. 12, 1860, takes the ground, that a minister of the United States has no civil or criminal jurisdiction among his fellow-countrymen or over his suite; and that what is called the extra-territoriality of the embassy relates only to what is necessary to the proper discharge of diplomatic functions, and does not make the place of the minister's residence a portion of the United States in such a sense that private persons, by presenting themselves there for purposes of private contracts, whether of marriage or of business, can give to their acts exemption from the law of that country, or the sanction of the law of their own country. If the latter effect is produced, it must be by force of statute law. (U. S. Laws, xii. 72, Act 1860, ch. 179.) Dr. Woolsey states the law to be that the authorization of his own State, and the consent of the State in which he resides, are both necessary to the exercise by the ambassador of any criminal jurisdiction over his suite, servants, or fellow-countrymen. If one of the suite commits a crime without the limits of the hotel, he is to be delivered to the ambassador to be dealt with. In modern times, the ambassador does no more than secure and send home the accused for trial, and prepare the evidence. His authority in civil matters is confined to authenticating and solemnizing testaments, contracts, and marriages, when empowered thereto by his own government. (Woolsey's Introd. § 92 *d.*) In the case of the coachman of Mr. Gallatin, the United States Minister in London, the British Government claimed the right to arrest him on a criminal charge, for an assault committed outside the residence, and to make the arrest within its limits; admitting, however, the propriety of first giving notice to the minister, that he might deliver him up, or make arrangements with the police as to the time and manner of their entering to search and seize. See note 129, *infra*, on Diplomatic Immunity.]—D.

(c) Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 124. Rutherford's Inst. vol. ii. b. ii. ch. 9, § 20. Klüber, Part II. tit. 2, §§ 212–214. Merlin, Répertoire, tit. *Ministre Publique*, sect. vi. [¹²⁹ *Diplomatic Immunity in a Foreign State*.—The subject of diplomatic immunity of

person and place has been obscured by the use of the phrase 'extra-territoriality.' Treating this figure of speech as a fact, and reasoning logically from it, have led to results of an unsatisfactory and impracticable character. If the hotel were, as the phrase supposes, absolutely out of the sovereign's territory, it would follow that he has no jurisdiction over an act done there, whatever its character and by whomsoever committed, unless he would have had such jurisdiction had the act been done on the soil of the ambassador's country. Thus, if a British subject committed an offence against another British subject within the limits of the hotel of the French Minister, neither being connected with the embassy, and was afterwards arrested in the streets, [304] the British court could not take cognizance of the crime, unless it could do so had it been actually committed in France. So, too, no process, civil or criminal, for any purpose, could be served within the hotel, although the person on whom it was to be served had no connection with the mission, and had only sought asylum there. Every such case would be one for international extradition.

A clear understanding of these questions requires that the phrase should be treated as a figure of speech, and not a fact from which inferences can be drawn. The true test is one lying behind and clear of that illustration. The whole subject depends upon this principle,—the convenience of nations. Nations necessarily agree that the functions of the ambassador must be performed with freedom. The ultimate test is, whether the exercise of the municipal authority in question is an unreasonable interference with that freedom. The questions in detail are,—what persons and places must have immunity, and what degree of immunity, in order to the securing of this object.

I. JURISDICTION OVER THE RESIDENCE OF THE AMBASSADOR,—CALLED, FOR CONVENIENCE, THE HOTEL, WHICH INCLUDES THE GROUNDS AND OUTBUILDINGS.

If the fiction of extra-territoriality were a fact, the question would admit but of one solution. But, the test being the convenience of nations, no reason is seen why the fact, that an act was done within the hotel, should of itself be a bar to jurisdiction. If a British subject commits an offence within the hotel of the French Minister against another British subject,

[304] § 227. The personal effects or movables belonging to the minister, within the territory of the State where he resides, are entirely

Exemption
of the
minister's
house and
property.

neither having any connection with the mission, and is afterwards arrested in the street, there seems no reason connected with the convenience or dignity of diplomacy why he should not be tried by the British courts, and every reason why he should not be exempt from their jurisdiction, and either *lege solutus*, or amenable only to French laws and procedure. In short, the mere fact that either a contract was made or a wrong done within the hotel, if not involving any privilege of the persons concerned, or of the place of arrest, seems to present no ground for ousting the sovereign of his jurisdiction.

II. IMMUNITY OF THE RESIDENCE OF THE AMBASSADOR.

It is conceded, that, in the extreme case of an emergency affecting the existence of the nation, as in the case of an insurrection in which the ambassador is implicated, if any diplomatic immunity of person or place is disregarded, in good faith and from necessity, it furnishes no just ground for international complaint. This exception, applicable alike to local and personal immunity, being once stated, may be dismissed from further consideration in this note.

Neither the opinions of text-writers nor the practice of nations is settled as to this general immunity. The British Government, it has been seen, has claimed the right to enter and make arrests, admitting only the propriety of giving notice. It seems, however, to be the fair result of reasoning on principle and of a comparison of authorities, that the hotel should enjoy (with the exception of the exigency stated) an absolute immunity from the service of compulsory process within its limits. Distinctions between civil and criminal processes, and between citizens and foreigners, and persons connected or not connected with the embassy, are complex and troublesome, and do not solve the difficulty. If the convenience of nations requires that the hotel be free from forcible entry and forcible process, it is best to have [305] a simple and avowed rule. Little practical inconvenience can arise from it. If, on demand, the ambassador refuses to deliver up the person sought, it becomes a diplomatic question between him and the sovereign to whom he is accredited, or between the two nations; and the sovereign has the usual remedy of dismissing the ambassador, and, if that is not enough, of refusing to receive another in his place, or to grant rights of diplomatic hotel, as well as other international remedies. It can hardly be supposed that an ambassador would fail to protect his hotel against being made an asylum for offenders, by having it understood that they would be at once delivered up. This immunity of the hotel from invasion is, of course, a local immunity, and is irrespective of the character or nationality of the person sought to be arrested, the nature of the offence, or place where it was committed. The duty of the ambassador to make delivery of any such person, on demand, is of course absolute in all cases where he does not claim an exclusive jurisdiction of his own country over the person or the offence; and, in that case, it is his duty to send the person home for trial, unless the laws of his own country give him jurisdiction to try the cause, and the sovereign to whom he is accredited assents to his exercise of such jurisdiction within his realm.

III. WHAT PERSONS ARE ENTITLED TO DIPLOMATIC IMMUNITY FROM CONSTRAINT.

It is agreed that the ambassador himself, and his family and suite, are entitled to immunity. The question is, who are comprehended within the terms 'family and suite.' The test must be, again, its effect upon the convenience of nations. It is reasonable that the immunity should be extended to the wife and children of the minister, and to such other persons as, in good faith, are permanent members of his family; and that it should not extend to mere visitors. It is impossible to make, in advance, a classification applicable to all cases. If a case arises respecting persons in a doubtful position between mere visitors and permanent members of the family, it must be settled on its own circumstances.

As to the suite, all writers and all practice agree that the official suite are protected; and by 'official suite' is meant persons employed directly in diplomatic duties, appointed or recognized by the ambassador's government as diplomatic functionaries. But doubts, it has been seen, are thrown out whether the immunity extends further. But surely the convenient discharge of his duties, according to the customs of society, requires that the ambassador shall have the necessary services, about his hotel and his person, of people usually employed in those capacities. If he is an invalid or temporarily ill, a nurse or body-servant is a necessity; and a right to free transportation, according to the customs and necessities of society, in his private carriage, and to the performance of offices in his household by proper persons, is reasonable.

exempt from the local jurisdiction; so, also, of his dwelling-house; but any other real [305] property, or immovables, of which he may be

Although it may be that high officials, in their own country, have no such general immunity for their servants and residences, still, in the case of a sole representative of his nation, under foreign and not necessarily friendly jurisdiction, the dignity and convenience of nations is best secured by a rule which shall give large protection, leaving the concessions and accommodations to comity and good faith in cases as they may arise. Here, again, a classification, in advance, of what shall in all cases be the personal suite of an ambassador entitled to exemption, is not practicable. The doubtful cases must rest on their circumstances. A mode sometimes adopted is for the minister to transmit to the Foreign Office a list of his official and personal suite; and, if [306] the Foreign Office thinks it an unreasonable one, objection can be made and the matter settled at the time.

IV. THE EXTENT OF THE PERSONAL IMMUNITY OF THE AMBASSADOR AND HIS SUITE.

It is agreed that the ambassador must be exempt from all constraint upon his person and his movements and the employment of his time. He cannot, of course, be arrested. It seems to be settled, that he cannot be required to attend as a witness in court; as this would involve an authority over his time and movements, to be exercised at the discretion of the local tribunals, and with reference to the convenience or rights of other parties or of the court. The same objections exist to his being obliged to give a *deposition*, in the sense of the common law, where he is examined by a magistrate and subject to cross-examination. (See note 125, *ante*.) With greater force it applies to his being compelled to attend court as a defendant. Even if rules are made by which ambassadors are exempt from a levy of execution on their persons or property, from committal for contempt, and by which their convenience is consulted, still the fact remains that their convenience and freedom would be at the discretion of the authorities of the nation, legislative or judicial, or both; and, if an ambassador should decline to attend court, and to comply with such rules as the authorities chose to enforce, a decree might be rendered against him which would conclude his rights.

The question has been a good deal discussed, whether the ambassador can proceed in the courts, as a plaintiff. It has been stated in many text-books that he can do so, by waiving his personal privilege. If all that is meant by that is, that, if he does waive the privilege, and invokes the jurisdiction of the court as a plaintiff, it is competent for the court to try the case, and the doing so will furnish no just ground of offence, it may be true. But, if it is meant, that, as between himself and his own sovereign, it is his right to waive the exemption and go into court as a plaintiff, it is enough, perhaps, to say, that that is not a question of international law, but of the direct relation between a sovereign and his agent. If it is appropriate to say any thing on that point, it may be suggested, that, without the assent of his own sovereign, no ambassador ought, by voluntarily appearing in court, either as plaintiff or as defendant, to place himself in a situation by which he may forfeit his right to exemption from control over his time or movements. As far as the courts are concerned, it would seem, that, if the ambassador invokes their jurisdiction as plaintiff, they may take cognizance of the case; and no just cause of international complaint can arise, if they withhold direct process on his person or property, and do not refuse to consult his reasonable convenience as far as the rights of others and the public business permit. In case a suit is filed against an ambassador, no nation allows the issue of a compulsory process against his person or property to secure his appearance; and it would seem to be equally a violation of principle to serve a notice upon him, and proceed to render a conclusive judgment against him in his absence, if he should decline to appear. The practice of France has been to send notice to the ambassador through the Foreign Office; but then, if he decline to appear, no further proceedings are had.

These rules and the reasons for them, in the case of the ambassador, are applicable to all persons having the diplomatic immunity. The loss or waiver of the privilege may be of little consequence in the case of many of them, but the rule must be uniform.

It has been contended, that, if the ambassador or one of his suite engage in [307] trade, he is liable to answer in court for any contracts or obligations arising out of his business. If the principle were carried out, the result would seem to be, that, in case of such an obligation, he waived his privileges entirely, and could be treated in all respects as any other tradesman, even to the arrest of his person. But this is not contended. It is said that he is liable to suit, with all its consequences, except the arrest of his person or exempted property. It would

possessed within the foreign territory, is subject to its laws and jurisdiction. Nor is the personal property of which he may be possessed as a merchant [306] carrying on trade, or in a fiduciary character, as an executor, &c., exempt from the operation of the local laws.(a)

[307] § 228. The question, how far the personal effects of a public minister are liable to be seized or detained, in order to enforce the performance, on his part, of the contract of hiring of a dwelling-house, inhabited by him, has been recently discussed between the American and Prussian governments, in a case, the statement of which may serve to illustrate the subject we are treating.

Discussion between the American and Prussian governments, respecting the exemption of public ministers from the local jurisdiction.

The Prussian Civil Code declares, that 'the lessor is entitled, as a security for the rent and other demands arising under the contract, to the rights of a *Pfandgläubiger*, upon the [308] goods brought by the tenant upon the premises, and there remaining at the expiration of the lease.'

The same code defines the nature of the right of a creditor whose debt is thus secured. 'A real right, as to a thing belonging to another,

seem that the plainer and better rule would be to make no distinction, and to allow the diplomatic officer his immunity from all suits, from whatever cause arising. His engaging in trade would be a cause of objection, both on the part of his own sovereign and of that to whom he is accredited: for, if he waived his privilege, it would be to the injury of his own sovereign; and, if he asserted it, it would be unfair towards the persons with whom he dealt. But it cannot be said that this is a settled doctrine, as there is great weight of authority in favor of the exception. But the modern practice disfavors and practically prohibits diplomatic agents from engaging in trade.

V. WHAT PROPERTY IS EXEMPT FROM ARREST.

All writers agree that the official property of the embassy is exempt; as the hotel, with its furniture and appurtenances; the personal effects of the ambassador; and every thing which can be said to be a means or instrumentality for exercising the diplomatic functions. (See note 130, *infra*.) The only question is as to real or personal property of the ambassador, being neither official property, personal effects, nor official instruments or means. The same objection exists to allowing process *in rem* against such property, as to requiring his appearing in court as a party or witness. If his property is proceeded against, he must become a litigant to defend or regain it, and be subjected to rules controlling his time and movements, even if he secures exemption from other obligations and liabilities of common suitors. The decision of this question ought not to depend, as most writers seem to make it, on the character of the property seized, as official or unofficial; for the seizure is but a step in the litigation. The owner is to have notice to appear and litigate, and must either lose his property or become a party to the litigation. The balance of convenience is in favor of the exemption from seizure of all the property of an officer whom it is right to exempt from being compelled to appear as a defendant in a strictly personal suit. He is liable in his own country; and the remedy by diplomatic complaint will usually be sufficient.

As to cases of property engaged in trade, or held in private trust, one rule of conduct ought to be laid down. The diplomatic officer should not engage either in trade, or in the execution of unofficial trusts which may involve litigation. If his so doing is regarded by international law as a waiver of his privilege, it may be in derogation of the rights of his own sovereign, whose privilege it is that he undertakes to waive. If it is not so regarded, it may operate unfairly upon other parties.]—D.

(a) Vattel, liv. iv. ch. 8, §§ 113-115. Martens, Précis, &c., liv. vii. ch. 8,⁽¹⁾ § 217. Klüber, Pt. II. tit. 2, ch. 3, § 210. Merlin, sect. v. § iv. No. 6.

[¹ For 8 read 5.]—G.G.W.

assigned to any person as security for a debt, and in virtue of which he may demand to be satisfied out of the substance of the thing itself, is called *Unterpfandsrecht*.^(a)

Under this law, the proprietor of the house in which the minister of the United States accredited at the court of Berlin resided, claimed the right of detaining the goods of the minister found on the premises at the expiration of the lease, in order to secure the payment of damages alleged to be due, on account of injuries done to the house during the contract. The Prussian government decided that the general exemption, under the law of nations, of the personal property of foreign ministers from the local jurisdiction, did not extend to this case, where, it was contended, the right of detention was created by the contract itself, and by the legal effect given to it by the local law. In thus granting to the proprietor the rights of a creditor whose debt is secured by hypothecation, (*Pfandgläubiger*), not only in respect to the rent, but as to all other demands arising under the contract, the Prussian Civil Code confers upon him a *real right* as to all the effects of the tenant, which may be found on the premises at the expiration of the lease, by means of which he may retain them, as a security for all his claims derived from the contract.

Argument
of the United
States Min-
ister against
the claim.

§ 229. It was stated, by the American minister, that this decision placed the members of the *corps diplomatique*, accredited at the Prussian court, on the same footing with the subjects of the country, as to the right which the Prussian code confers upon the lessor of distraining the goods of the tenant, to enforce the performance of the contract. The only reason alleged to justify such an exception to the general principle of exemption was, that the right in question was constituted by the contract itself. It was not pretended that such an exception had been laid down by any writer of authority on the law of nations; and this consideration alone presented a strong objection against its validity, it being notorious that all the exceptions to the principle were carefully enumerated by the most [309] esteemed public jurists. Not only is such an exception not confirmed by them, but it is expressly repelled by these writers. Nor could it be pretended that the practice of a single government, in a single case, was sufficient to create an exception to a principle which all nations regarded as sacred and inviolable.

Doubtless, by the Prussian code, and that of most other nations, the contract of hiring gives to the proprietor the right of seizing, or detaining the goods of the tenant, for the non-payment of rent, or damages incurred by injuries done to the premises. But the question here was, not what are the rights conferred by the municipal laws of the country upon the proprietor, in respect to the tenant who is a subject of that country; but what are those rights in respect to a foreign

(a) Allgemeines Landrecht für die preussischen Staaten, Part I. tit. 21, § 395; tit. 30, § 1.

minister, whose dwelling is a sacred asylum; whose person and property are entirely exempt from the local jurisdiction; and who can only be compelled to perform his contracts by an appeal to his own government. Here the contract of hiring constitutes, *per se*, the right in question, in this sense only, that the law furnishes to one of the parties a special remedy to compel the other to perform its stipulations. Instead of compelling the lessor to resort to a personal action against the tenant, it gives him a lien upon the goods found on the premises. This lien may be enforced against the subjects of the country, because their goods are subject to its laws and its tribunals of justice; but it cannot be enforced against foreign ministers resident in the country, because they are subject neither to the one nor to the other.

Let us suppose that the contract in question had been a bill of exchange drawn by the minister, not in the character of a merchant, but for defraying his ordinary expenses. The laws of every country, in such a case, entitle the holder of the bill to arrest the person of his debtor, in case of non-payment. It might be said, in the case supposed, that the contract itself gives the right of arresting the person, with the same reason that it was pretended, in the case in question, that it gave the right of seizing the goods of the debtor.

In fact, there was no one privilege of which a public minister might not be deprived, by the same mode of reasoning which was resorted to in order to deprive him of the exemption to which he was entitled as to his personal effects. But to deprive him of this right alone, would be to deprive him of that independence and security which are indispensably necessary to enable him to fulfil [310] the duties he owes to his own government. If a single article of his furniture may be seized, it may all be seized, and the minister, with his family, thus be deprived of the means of subsistence. If the sanctity of his dwelling may be violated for this purpose, it may be violated for any other. If his private property may be taken upon this pretext, the property of his government, and even the archives of the legation, may be taken upon the same pretext.

§ 230. The exemption of the goods of a public minister from every species of seizure for debt, is laid down by Grotius in the following manner: Position of Grotius, on the subject.

‘As to what respects the personal effects (*mobilia*) of an ambassador, which are considered as belonging to his person, they are not liable to seizure, neither for the payment nor for security of a debt, either by order of a court of justice, or, as some pretend, by command of the sovereign. This, in my judgment, is the soundest opinion; for an ambassador, in order to enjoy complete security, ought to be exempt from every species of restraint, both as to his person, and as to those things which are necessary for his use. If, then, he has contracted debts,

and if, which is usually the case, he has no real property (*immobilia*) in the country, he should be politely requested to pay, and if he refuses, resort must be had to his sovereign.'^(a)

We here perceive that this great man himself, both as a public minister and public jurist, was decidedly of opinion that the personal property of an ambassador could not be seized, either for the payment or for security of a debt; or, according to the original text,—*Ad solutionem debiti aut pignoris causâ*. Bynkershoek, in his treatise *De Foro competenti*⁽¹⁾ *Legatorum*, cites with approbation this passage of Grotius.

Position of
Bynkershoek,
on the sub-
ject.

§ 231. Bynkershoek himself, in commenting upon the declaratory edict of the States-General of the United Provinces, of 1679, exempting foreign ministers from arrest, and their effects from attachment, for debts contracted in the country, observes:—

'The declaration of the States-General does not materially differ from the opinion of Grotius, which I have quoted in the preceding chapter. To which we may add, that this author states, that the effects of an ambassador cannot be seized, either for payment or [311] for security of a debt, because they are considered as appertaining to his person. Respecting this principle Antoine Mornac reports that, in the year 1608, Henry IV. king of France, pronounced against the legality of a seizure made at Paris, for the non-payment of rent, of the goods of the Venetian ambassador. This decision has been since constantly observed in every country.

'But this may be said to be carrying the privilege too far, since the seizure of the effects of an ambassador is not so much on account of the person as to a right in the thing thus seized; a right of which the proprietor cannot be deprived by the ambassador.'

This author had here anticipated the argument of the Prussian government, to which he replies as follows:—

'But far from unduly pressing the principle, by the *effects* which are spoken of in the declaration of 1679 I understood only personal effects, that is to say, those which serve for the use of ambassadors, (*id est utensilia*), as I shall point out in that part of this treatise where it will be necessary to speak of their property. It is of these effects that I affirm, that they are not, and never have been, according to the law of nations, considered as in the nature of a pledge, to secure the payment of what is due from an ambassador. I even maintain that it is not lawful to seize them, either in order to institute a suit or to execute a judicial sentence.'^(a)

In his sixteenth chapter Bynkershoek explains what he means by those effects which serve for the use of ambassadors, that is, *utensilia*.

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 9

(a) Bynkershoek, de Foro Legatorum, cap. 9, §§ 9, 10.

[¹ Omit *competenti*.]—G.G.W.

In this chapter he admits that the property, both personal and real, of a public minister, may, *in some cases*, be attached, to compel him to defend a suit commenced by those who might have a claim against him:—‘I say the property (*bona*) in general, whether personal or real, unless they appertain to the person of the ambassador and he possesses them as ambassador; in a word, all those things without which he may conveniently perform the functions of his office. I except, then, from the number of those goods of the ambassador which may be thus attached, corn, wine, oil, every kind of provisions, furniture, gold, toilette, ornaments, perfumes, drugs, clothing, carpets and tapestry, coaches, horses, mules, and all other things which may be comprised in the terms of the Roman law, *legati instructi et cum instrumento*.’

In the following section he explains his doctrine, that certain [312] effects of a public minister may be attached, in order to institute against him a suit, and to compel him to defend it, by showing that it is meant to be limited to the single case where the minister assumes on himself the character of a merchant, in which case the goods possessed by him, as such, may be attached for this purpose. ‘All these things,’ says he, ‘ought not, according to my view, to be excepted, unless they are destined for the use of the ambassador and his household. For it is not the same with corn, wine, and oil, for example, which an ambassador may have in his warehouses, for the purposes of trade; nor with horses and mules, which he may keep for the purpose of breeding and selling.’

§ 232. Vattel is equally explicit as to the extent of the privilege in question. The only exception he admits to the general rule is that of a public minister who engages in trade, in which case his personal goods may be attached, to compel him to answer to a suit. To this exception he annexes two conditions, the latter of which was deemed decisive of the present question.

Position of
Vattel, on
the subject.

‘Let us subjoin two explanations of what has just been said: 1. In case of doubt, the respect which is due to the character of a public minister requires the most favorable interpretation for the benefit of that character. I mean to say that where there is reason to doubt whether an article is really destined to the use of the minister and his household, or whether it belongs to his stock in trade, the question must be determined in favor of the minister; otherwise there might be danger of violating his privilege. 2. When I say that the effects of a minister, which have no connection with his character, and especially those belonging to his stock in trade, may be attached, this must be understood on the supposition that the attachment is not grounded on any matter relating to his concerns as minister; as, for instance, for supplies furnished to his household, for the rent of his hotel, &c.’(a)

(a) Vattel, *Droit des Gens*, liv. iv. ch. 8, § 114. Mr. Wheaton to Baron de Werther, Note verbale, 15th May, 1839.

Reply of the
Prussian
government.

§ 233. In reply to these arguments and authorities it was urged, on behalf of the Prussian government, that if, in the present case, any Prussian authority had pretended to exercise a right of jurisdiction, either over the person of the minister or his property, the solution of the question would doubtless appertain to the law of nations, and it must be determined [313] according to the precepts of that law. But the only question in the present case could be, what are the legal rights established by the contract of hiring, between the proprietor and the tenant. To determine this question, there could be no other rule than the civil law of the country where the contract was made, and where it was to be executed, that is, in the present case, the Civil Code of Prussia.^(a)

Adjustment
of the con-
troversy.

§ 234. The controversy having been terminated, as between the parties, by the proprietor of the house restoring the effects which had been detained, on the payment of a reasonable compensation for the injury done to the premises, the Prussian government proposed to submit to the American government the following question:

Proposal of
the Prussian
to the
United
States gov-
ernment.

§ 235. 'If a foreign diplomatic agent, accredited near the government of the United States, enters, of his own accord, and in the prescribed forms, into a contract with an American citizen; and if, under such contract, the laws of the country give to such citizen, in a given case, a *real right* (*droit réel*), over personal property (*biens mobiliers*), belonging to such agent: does the American government assume the right of depriving the American citizen of his *real right*, at the simple instance of the diplomatic agent relying upon his extra-territoriality?'

Reply of
the United
States gov-
ernment.

§ 236. This question was answered on the part of the American government, by assuming the instance contemplated by the Prussian government to be that of an *implied* contract, growing out of the relation of landlord and tenant, by which the former had secured to him, under the municipal laws of the country, a tacit *hypothek* or lien upon the furniture of the latter. It was taken for granted that there was no express hypothecation, still less any giving in *pledge*, which implies a transfer of possession by way of security for a debt.

This distinction was deemed important. There could be no doubt that, in this last case, the pawnee has a complete right, a *real right* as it was called by the Prussian government, or *jus in re*, not in the least affected by diplomatic immunities. And accordingly, this was the course pointed out to creditors by Bynkershoek, who denies them all other means of satisfying themselves out of [314] the minister's personal goods. Of course, these words were used with the proper restriction, which confines them to the *apparatus legationis*, or such as pass under the description of *legatus instructus et cum instrumento*.

With these distinctions and qualifications, the American govern-

(a) Baron de Werther to Mr. Wheaton, Note verbale, 19th May, 1839.

ment had no doubt that the view taken by its minister of this question of privilege was entirely correct. The sense of that government had been clearly expressed in the act of Congress, 1790, which includes the very case of distress for rent, among other legal remedies denied to the creditors of a foreign minister.

That this exemption was not peculiar to the statute law of this country, but was strictly *juris gentium*, appeared from the precedents mentioned by the great public jurist just cited in his treatise *De Foro Legatorum*, the great canon of this branch of public law.^(a)

Besides this conclusive authority upon the very point in question, Bynkershoek states the principle (out of Grotius) that the personal goods of a foreign minister cannot be taken by way of distress or pledge, and gives it the sanction of his most emphatic assent.^(b) Indeed the whole scope of the treatise referred to, went to establish this very doctrine.

§ 237. But to consider it on principle. Three several questions would arise upon the inquiry propounded by the Prussian government. 1st. Is the landlord's right, [315] in such a case, a *real right* properly so called? 2d. Admitting it to be so, can it be asserted, consistently with Prussian municipal law, against a foreign minister who has not voluntarily parted with his possession, on an express contract, to secure payment of rent or damages? 3d. Supposing the municipal law of Prussia to contemplate the case of a foreign minister, can that law be enforced, in such a case, consistently with the law of nations?

The subject considered on principle.

§ 238. There was, in all systems of jurisprudence, great difficulty in settling the legal category of the landlord's right. Pledge, although not property, is certainly a real right; but a mere lien or hypothek, in which there is no transfer of possession, is not a pledge. In England,

Was the right of the landlord a real right, or *jus in re*?

(a) 'Qui⁽¹⁾ hæc (bona) considerantur, ut personæ accessiones.⁽¹¹⁾ Et secundum hæc Mornacius refert ad L. 2, § 3 ff, de *Judic.* Regi Galliarum placuisse, anno 1608, male pro locario Parisiis Venetæ reipublicæ legati mobilia fuisse retenta; et constanter ita usu est servatum deinceps ubique gentium. Sed forte dices; id nimium esse, quia ea mobiliū detentio non tam fit ex causâ personæ, quàm jure in re, quod locatori competit in *invectis et illatis, quodque jus, lege quæsitum, legatis auferre non possit.* Sed tantum abest, ut nimium dicamus, ut vel bona, quorum meminit d. Edictum anni 1679, non aliter interpretemur, quàm bona mobilia, id est, utensilia, &c.⁽¹¹¹⁾ Hæc utensilia nego, ex jure gentium, pignori esse, vel unquam fuisse, quin nec capi posse, vel ad ordiendum judicium, vel ad servandum, quod nobis debetur, vel ad exsequendam rem judicatam. Et facile assentior Grotio, si de utensilibus accipias, quæ ipse dixit, ea nempe pignoris causâ capi non posse, nec per judiciorum ordinem, nec manu regiâ, explosâ sic distinctione, quæ aliis olim, sed sine ratione, placuerat.' *De Foro Legat.*, cap. ix.

Compare the catalogue of the personal goods so privileged, *id.* cap. xvi.

(b) 'Bona quoque legati mobilia, et quæ proinde habentur personæ accessio, pignoris causâ, aut ad solutionem debiti, capi non posse, nec per judiciorum ordinem, nec quod quidam volunt, manu regiâ, verius est: nam omnis coactio a legato abesse debet, tam quæ res ei necessaria, quàm quæ personam tangit, quo plena ei sit securitas.' Bynkershoek, de *Foro Legatorum*, cap. viii. Grotius, de *Jur. Bel. ac Pac.* lib. ii. cap. 18, § 19.^(1v)

[¹ For Qui read . . . quia.]—G.G.W.

[¹¹ Omitt]—G.G.W.

[¹¹¹ For utensilia, &c. read utensilia, quemadmodum plenius dicam, ubi de bonis legatorum disputandum erit.]—G.G.W.

[^{1v} For § 19 read § 9.]—G.G.W.

and in the United States, the right of landlords was originally a mere lien, reducible by distress into a right of pledge. In Scotland the same right is sometimes called a right of property, and sometimes a mere hypothek, springing out of a tacit contract. Without pretending to determine precisely whether its origin ought to be referred to the one or the other principle, (neither perhaps being fully adequate to account for all its effects,) it is considered by the best writers as a right of hypothek, convertible by a certain legal process into a real right of pledge.

If this be a proper view of the subject, there was surely an end of the question: for the *process* of conversion is as much the exercise of jurisdiction, as the levying an execution; and the public minister is exempt from all jurisdiction whatever.

It was true that all hypothecations, or privileges upon property, are classed by some writers under the head of real rights, but this was by no means conclusive of the case under consideration. In a conflict of rights, this might entitle the privileged creditor to *preference* in the distribution of an inadequate fund; but the question was, how was he to assert that preference? By means of judicial process? If so, he is without remedy against one not subject to the jurisdiction, except by open violence, which, of course, is not classed among rights. Accordingly, privileges, and liens by mere operation of law, are usually considered as matters of *remedy*, not of *right*; as belonging to the *lex fori*, not to the essence of the contract.^(a)

It might, therefore, be considered as doubtful, *a priori*, whether, by the Prussian code, the right of the landlord is a real right, to [316] the effect, at least, of putting it on the footing of property transferred by contract, for that was the argument.

§ 239. But suppose this to be the usual effect, by operation of law, of the contract between landlord and tenant, does it hold as against one not subject to the law; not amenable to the jurisdiction; not, in legal contemplation, residing within the country of the contract?

If a real right, can it be enforced under the Prussian law, in derogation of diplomatic immunity?

By the supposition, it was an *incident* in law of the relation between the landlord and his tenant, and it turns upon an *implied* contract. It was supposed that the tenant agreed to hire the house on the usual conditions; but one of them was, that if he failed to pay the rent, or indemnify for damages done to the premises, the landlord should have a remedy by distress. It was, therefore, inferred that it was not the law, or the judge, but the tenant himself, who had transferred, *quasi contractu*, this interest in his own property. But if this reasoning was correct, why should it not apply in the case of arrest and holding to bail? or in any case of attachment? The consent might as well be implied here, as in favor of a landlord. Indeed, the same implication

(a) Story's Conflict of Laws, §§ 423-456, 2d. edit.

might as reasonably be extended to all laws whatever, and foreign ministers thus be held universally subject by contract to the municipal jurisdiction. The presumption implied in the contract under the law of the place, and binding on the parties subject to the jurisdiction, is repelled by the immunity and extra-territoriality of the public minister. He that enters into a contract with another knows, or ought to know, his condition. So says Ulpian, (l. 19, pref. D. de R. S.,) and the landlord who lets his house to a foreign minister, waives his remedy under the law from which he knows that minister is exempt.

The American government was therefore inclined, in the absence of any authority to the contrary, to think that the Prussian municipal law, properly interpreted, did not, in fact, authorize any such pretension as that set up by the landlord, in the present instance.

§ 240. But even supposing it did authorize the pretension, it ought no more to derogate from the established law of nations in this case, than in that of personal arrest. The authorities cited above seemed to the American government entirely conclusive as to this point; and it was greatly confirmed in this view of the subject by the act of Congress declaratory of the law of nations, and by the [317] opinion of other governments. In short, all the reasons on which diplomatic immunities have been asserted, and are now universally allowed, seem just as applicable to the case of liens and hypothecations in favor of landlords, as to remedies of any other kind. Indeed, nothing could afford a better practical illustration of this than the attempt of the landlord in the present case, by means of his pretended lien, to force the minister to pay damages assessed at his discretion, for an injury proved only by his own allegation. (a)

If it can be enforced by Prussian law, is not that in derogation of the *jus gentium*?

§ 241. The Prussian government declared, that its opinion upon the point in controversy remained unchanged by the above reasoning, and the authorities adduced in support of it. According to its view, the question was not, whether the lessor had a right to retain a portion of the effects belonging to the lessee, and found on the premises at the expiration of the contract, as security for the damages incurred by its breach; but whether the lessor, by exerting his right of retention, had committed a violation of the privileges of diplomatic agents, or, at least, a punishable act; and if, for this reason, he could be compelled, summarily, and before the competent judge had pronounced upon his claim, to restore the effects thus retained. This last question being resolved negatively, the decision of the first must necessarily be reserved to the competent tribunals.

Rejoinder of the Prussian government.

The privilege of extra-territoriality consists in the right of the diplomatic agent to be exempt from all dependence on the sovereign power of the country, near the government of which he is accredited.

(a) Mr. Legaré's Despatch to Mr. Wheaton, 9th June, 1843.

It follows, that the State cannot exercise against him any act of jurisdiction whatsoever, and as by a natural consequence of this principle, the tribunals of the country have, in general, no right to take cognizance of controversies in which foreign ministers are concerned, neither are they authorized, in the particular case of a controversy arising out of a contract of hiring, to ordain the seizure of the effects of a public minister.

If, then, the privilege of extra-territoriality regards only the relations which subsist between the diplomatic agent and the sovereign power of the country where he resides, it is also evident that a violation of this privilege can only be committed by the public authorities of that country, and not by a private person. The legal relations of the subjects of the country are in no respect *directly* changed by the principle of extra-territoriality; it is only [318] *indirectly* that this principle can operate upon those relations; so that in respect to citizens' controversies, the subject is not entitled to invoke the interposition of the authorities of his own country against the foreign minister upon whom he may have a claim for redress, and if he would commence a suit against him, he must resort to the tribunals of the minister's country. If, on the other hand, the subject can do himself justice, without having recourse to the authorities of his own country, his position in respect to the foreign minister is absolutely the same as if the controversy had arisen with one of his own fellow-citizens.

It was hardly necessary to observe that, in such a case, the party must keep within the limits of what is generally permitted. If he should resort to violence, he would render himself guilty of an infraction of the law, and would be punishable in the same manner as if the adverse party were an inhabitant of the country.

In the controversy now in question, no authority dependent on the Prussian government had participated, either directly or indirectly, in the seizure of the effects of the American minister; the proprietor of the house having retained them by his own proper act, there was then no violation of the privilege of extra-territoriality. There was no proof of any act of violence having been committed by him, and the mere act of retention could not be considered as an unlawful act.

On principle, every proprietor of a house, even where it is let to another person, remains in possession of his property. It follows, that the effects brought on to the premises by the tenant may be considered, in some respects, as in possession of the landlord. It is for this reason that the municipal law of Prussia, as well as that of most other European States, gives to the landlord a lien upon the goods of the tenant, as a security for the payment of the rent. The question how far this right, founded upon the positive law of a particular country, can be exerted against a foreign minister, may be dismissed from considera-

tion; since the act of retention cannot be regarded as an unlawful and punishable act, and, in such a case, it belongs to the tribunals of justice to pronounce judgment upon the rights which the landlord may have acquired by the retention.^(a)¹³⁰

[319] § 242. The person and personal effects of the minister are not liable to taxation. He is exempt from the payment of duties on the importation of articles for his own personal use and that of his family. But this latter exemption is, at present, by the usage of most nations, limited to a fixed sum during the continuance of the mission. He is liable to the payment of tolls and postages. The hotel in which he resides, though exempt from the quartering of troops, is subject to taxation, in common with the other real property of the country, whether it belongs to him or to his government.¹³¹ And though, in

Duties
and taxes.

(a) Baron de Bulow's Letter to Mr. Wheaton, 5th July, 1844.

See an able review of the above controversy by Mr. Fœlix, the learned editor of the *Revue du Droit Français et Étranger*, tom. ii. p. 31.

[¹³⁰ It is a general principle in domestic tribunals, that, if the property in question [319] is an instrumentality of sovereignty, the court will not enforce the lien by compulsory process, although the case be one in which the law would create a lien on property as between citizens, as in case of salvage or collision. (*Briggs v. The Light-ships*,¹ Allen's Rep. xi. Opinion of Judge Lowell, in *The Siren*, United States District Court, Massachusetts, 1866.) There is the stronger reason for this exemption in a case between an ambassador and a foreign tribunal. If, in the case between Mr. Wheaton and the Prussian Government, the landlord claimed only a lien or tacit hypothecation by act of law, to enforce which he would be obliged to invoke the aid of a court, and the property was of a kind which would be exempt from seizure by direct process, it should have been secured to the ambassador; and the case seems to have been of that nature. In the United States, the personal property of a diplomatic officer cannot be seized by judicial process, for any purpose (U. S. Laws, i. 118); nor can an inn-holder retain his wearing apparel or personal effects, to enforce an admitted lien. (Opinions of Att. Gen. v. 70.) In the case of an express pledge, by which the owner surrenders possession, and creates a qualified property, or *ius in re*, in the pledgee, he must be the *actor* himself, if he would regain possession. In that case, the pledgee does not need a compulsory process of a court. If Mr. Wheaton had pledged the articles to the landlord by a contract, he might be considered as having waived his official privilege in respect to them. But if the landlord had only a lien by force of general law, and that lien was only a right, to enforce which he was obliged to invoke the aid of a court and use its process, the question was not an abstract one of civil law on the existence of the lien, but a question of public law, whether compulsory process shall be permitted by a State against property *in that predicament*, whatever be the nature of the claim. In the *Light-ship* cases, above referred to, the builder had a lien on the vessels by general law, which attached before they became the property of the government; but it was held that the judicial tribunals could not enforce the lien against property *in that predicament*; that is, when held by the government as an instrumentality for the exercise of its sovereign powers. The remedy of the builders was an appeal to the government itself. It would seem, that, if certain effects of an ambassador are entitled to immunity on considerations of international convenience, they should be equally so when seized to enforce a tacit lien or hypothecation, as in any other case where there has been no express waiver of the immunity by a transfer of possession in the way of pledge or otherwise.]—D.

[¹³¹ Dr. Twiss (*Law of Nations*, i. § 203) states the present rule and practice somewhat differently: 'A foreign minister is privileged from being called upon to contribute personally to the general taxes of a country; that is, to such taxes as are levied by the government, and which are available for the general purposes of the State, in which the ambassador is not interested. But a foreign minister is not [320] exempt from the payment of local dues which are

[¹ For *Briggs v. The Light-ships* read *Briggs* and another *v. Light-Boats*.]—G.G.W.

general, his house is [320] inviolable, and cannot be entered, without his permission, by police, custom-house, or excise officers, yet the abuse of this privilege, by which it was converted in some countries into an asylum for fugitives from justice, has caused it to be very much restrained by the recent usage of nations.^(a)¹³²

Messen-
gers and
couriers.

§ 243. The practice of nations has also extended the inviolability of public ministers to the messengers and couriers, sent with despatches to or from the legations established in different countries. They are exempt from every species of visitation and search, in passing through the territories of those powers with whom their own government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own government, attesting their official character; and, in the case of despatches sent by sea, the vessel or *aviso* must also be provided with a commission or pass. In time of war, a special arrangement, by means of a cartel or flag of truce, furnished with passports, not only from their own government, but from its enemy, is necessary, for the purpose of securing these despatch vessels from interruption, as between the belligerent powers. But an ambassador, or other public minister, resident in a neutral country for the purpose of preserving the relations of peace and amity between the neutral State and his own government, has a right freely to send his despatches in a neutral vessel, which cannot lawfully be interrupted by the cruisers of a power at war with his own country.^(a)¹³³

Public
minister
passing
through the
territory of
another
State than
that to
which he is
accredited.

[321] § 244. The opinion of public jurists appears to be somewhat divided upon the question of the respect and protection to which a public minister is entitled, in passing through the territories of a State other than that to which he is accredited. The inviolability of ambassadors, under the law of nations, is understood by Grotius and Bynkershoek, among others, as binding only on those to whom they are sent,

raised for purposes of local administration, and which are expended on local objects, from which he himself, in common with his neighbors, derives immediate benefit. Thus, he is liable to pay local rates assessed upon his hotel or its site for sewerage, lighting, watching, and similar objects. This liability has sometimes been⁽¹⁾ disputed; and Klüber holds it to be doubtful whether such rates can be rightfully exacted, if the ambassador is unwilling to pay them. Wheaton considers the ambassador's hotel to be subject to taxation, in common with other⁽¹¹⁾ real property of the country. A practical difficulty will always be found in levying the rates,⁽¹¹¹⁾ as the person and property of the ambassador are^(1v) exempt from the jurisdiction of the civil tribunals, which must be appealed to in order to enforce payment, in the last resort.^(v)—D.

(a) Vattel, liv. iv. ch. 9, §§ 117, 118. Martens, Précis, &c. liv. vii. ch. 5, § 220. Manuel Diplomatique, ch. 3, §§ 30, 31. Merlin, Répertoire, tit. *Ministre Publique*, sect. v. § 5, Nos. 2, 3.

¹³² See note 129, *ante*, on Diplomatic Immunity.]—D.

(a) Vattel, liv. iv. ch. 9, § 123. Martens, Précis, &c., liv. vii. ch. 13, § 250. The Caroline, Robinson's Adm. Rep. vi. 466.

¹³³ See note, *infra*,^(v1) on Carrying Hostile Persons or Papers.]—D.

¹ For sometimes been *read* been sometimes.]—G.G.W.

¹¹ For with other *read* with the other.]—G.G.W.

¹¹¹ For the rates *read* them.]—G.G.W.

^v This quotation is from footnote 66 of Twiss.]—G.G.W.

^{v1} For note, *infra* *read* note 228, *infra*.]—G.G.W.

[^{1v} For are *read* is.]—G.G.W.

and by whom they are received.(a) Wicquefort, in particular, who has ever been considered as the stoutest champion of ambassadorial rights, asserts that the assassination of the ministers of the French king, Francis I., in the territories of the Emperor Charles V., though an atrocious murder, was no breach of the law of nations, as to the privileges of ambassadors. It might be regarded as a violation of the right of innocent passage, aggravated by the circumstance of the dignified character of the persons on whom the crime was committed,—and might even be considered a just cause of war against the emperor, without involving the question of protection in the character of ambassador, which arises exclusively from a legal presumption which can only exist between the sovereigns from and to whom he is sent.(b)

§ 245. Vattel, on the other hand, states that passports are necessary to an ambassador, in passing through different territories on his way to his destined post, in order to make known his public character. It is true that the sovereign to whom he is sent is more especially bound to cause to be respected the rights attached to that character; but he is not the less entitled to be treated, in the territory of a third power, with the respect due to the envoy of a friendly sovereign. He is, above all, entitled to enjoy complete personal security; to injure and insult him would be to injure and insult his sovereign and entire nation; to arrest him, or commit any other act of violence against his person, would be to infringe the rights of legation which belong to every sovereign. Francis I. was therefore fully justified in complaining of the assassination of his ambassadors, and, as Charles V. refused satisfaction, in declaring war against him. 'If an innocent passage, with complete security, is due to a private indi[322]vidual, with still more reason is it due to the public minister of a sovereign, who is executing the orders of his master, and travelling on the business of his nation. I say *an innocent passage*; for if the journey of the minister is liable to just suspicion, as to its motives and objects; if the sovereign, through whose territories he is about to pass, has reason to apprehend that he may abuse the liberty of entering them for sinister purposes, he may refuse the passage. But he cannot maltreat him, or suffer others to maltreat him. If he has not sufficient reasons for refusing the passage, he may take such precautions as are necessary to prevent the privilege being abused by the minister.'^(a)

He afterwards limits this right of passage to the ambassadors of sovereigns with whom the State through which the attempt to pass is, at the time, in the relations of peace and amity; and adduces, in

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 5. Bynkershoek, de Foro Legatorum, cap. ix. § 7.

(b) Wicquefort, de l'Ambassadeur, liv. i. § 29, pp. 433-439.

(a) Vattel, Droit des Gens, liv. iv. ch. 7, §§ 84, 85.

Vattel's
opinion on
this point.

support of this limitation of the right, the case of Marshal Belle-Isle, French ambassador at the Prussian court, in 1744, (France and Great Britain being then at war,) who, in attempting to pass through Hanover, was arrested and carried off a prisoner to England.^(b)

Bynkers-
hoek's
opinion on
this point.

§ 246. Bynkershoek maintains that ambassadors, passing through the territories of another State than that to which they are accredited, are amenable to the local jurisdiction, both civil and criminal, in the same manner with other aliens, who owe a temporary allegiance to the State. He interprets the edict of the States-General, of 1679, exempting from arrest 'the persons, domestics, and effects of ambassadors, *hier te lande komende, residerende of passerende*,' as extending only to those public ministers actually accredited to their High Mightinesses. He considers the last-mentioned term, *passerende*, as referring not to those who, coming from abroad, merely pass through the territories of the State in order to proceed to another country, but to those only who are about to leave the State where they have been resident as ministers accredited to its government.^(a)

Merlin's
opinion on
this point.

§ 247. This appears to Merlin to be a forced interpretation. 'The word *passer* in French, and *passerende* in Dutch,' says he, 'was never used to designate a person returning from a given place; but is applicable to one who, having [323] arrived at that place, does not stop there, but proceeds on to another. We must, therefore, conclude that the law in question attributes to ambassadors who merely pass through the United Provinces the same independence with those who are there resident. If it be objected, as Bynkershoek does object, that the States-General (that is, the authors of this very law) caused to be arrested, in 1717, the Baron de Görtz, ambassador of Sweden at the court of London, at the request of George I., against the security of whose crown he had been plotting, the answer to this example is furnished by Bynkershoek himself. "The only reason," says he, "alleged by the States-General for this proceeding was, that this ambassador had not presented to them his letters of credence." This reason (continues Merlin) is not the less conclusive for being the only one alleged by the States-General. When it is said that an ambassador is entitled, in the territories through which he merely passes, to the independence belonging to his public character, it must be understood with this qualification, that he travels *as an ambassador*; that is to say, after having caused himself to be announced as such, and having obtained permission to pass in that character. This permission places the sovereign, by whom it has been granted, under the same obligation as if the public minister had been accredited to and received by him. Without this

^(b) Ch. de Martens, *Causas Célèbres du Droit des Gens*, tom. i. p. 310.⁽¹⁾

^(a) Bynkershoek, de *Foro Legatorum*, cap. ix. Wheaton's *Hist. Law of Nations*, 243.

[¹ *Inserti* ii. p. 1. after p. 310.]—G.G.W.

permission, the ambassador must be considered as an ordinary traveller, and there is nothing to prevent his being arrested for the same causes which would justify the arrest of a private individual.'(a)

To these observations of the learned and accurate Merlin it may be added, that the inviolability of a public minister in this case depends upon the same principle with that of his sovereign, coming into the territory of a friendly State by the permission, express or implied, of the local government. Both are equally entitled to the protection of that government, against every act of violence and every species of restraint, inconsistent with their sacred character. We have used the term *permission, express or implied*; because a public minister accredited to one country who enters the territory of another, making known his official character in the usual manner, is as much entitled to avail himself of the permission which is implied from the absence of any prohibition, as would be the sovereign himself in a similar case.(b)¹³⁴

[324.] § 248. A minister resident in a foreign country is entitled to the privilege of religious worship in his own private chapel, according to the peculiar forms of his national faith, although it may not be generally tolerated by the laws of the State where he resides. Ever since the epoch of the Reformation, this privilege has been secured, by convention or usage, between the Catholic and Protestant nations of Europe. It is also enjoyed by the public ministers and consuls from the Christian powers in Turkey and the Barbary States. The increasing spirit of religious freedom and liberality has gradually extended this privilege to the establishment, in most countries, of public chapels, attached to the different foreign embassies, in which not only foreigners of the same nation, but even natives of the country of the same religion, are allowed the free exercise of their peculiar worship. This does not, in general, extend to public processions, the use of bells, or other external rites celebrated beyond the walls of the chapel.(a)

Freedom
of religious
worship.

§ 249. Consuls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties, and whatever special privileges may be conferred upon them by the local laws and usages, or by international compact, they are not entitled, by the general law of nations, to the peculiar immunities of ambassadors. No State is bound to permit the residence of foreign consuls, unless it has stipulated by convention to receive them. They are to be approved and admitted by the local sovereign, and, if guilty of illegal or improper conduct, are liable to have the *exequatur*, which is granted them, withdrawn, and may be punished by the laws of the State where they reside,

Consuls not
entitled to
the peculiar
privileges
of public
ministers.

(a) Merlin, Répertoire, tit. *Ministre Publique*, sect. v. § 3, Nos. 4, 12.

(b) *Vide supra*, § 95.

[¹³⁴ See also Klüber, *Droit des Gens*, § 170.]—D.

(a) Vattel, liv. iv. ch. 7, § 104. Martens, *Précis*, &c., liv. vii. ch. 6, §§ 222–226. Klüber, *Droit des Gens Moderne de l'Europe*, Part II. tit. ii. ch. 3, §§ 215, 216.

or sent back to their own country, at the discretion of the government which they have offended. In civil and criminal cases they are subject to the local law, in the same manner with other foreign residents owing a temporary allegiance to the State.^(a)¹³⁵

Termination
of public
mission.

[325] § 250. The mission of a foreign minister resident at a foreign court, or at a Congress of ambassadors, may terminate during his life in one of the following modes:—

1. By the expiration of the period fixed for the duration of the mission; or, where the minister is constituted *ad interim* only, by the return of the ordinary minister to his post. In either of these cases a formal recall is unnecessary.

2. When the object of the mission is fulfilled, as in the case of embassies of mere ceremony; or, where the mission is special, and the object of the negotiation is attained or has failed.

3. By the recall of the minister.

4. By the decease or abdication of his own sovereign, or the sovereign to whom he is accredited. In either of these cases, it is necessary that his letters of credence should be renewed; which, in the former instance, is sometimes done in the letter of notification written

(a) Wicquefort, de l'Ambassadeur, liv. i. § 5. Bynkershoek, cap. 10. Martens, Précis, &c., liv. iv. ch. 3, § 148. Kent's Comm. i. 38-44. Fœlix, Droit International Privé, § 191.

[¹³⁵ As to the *status* of consuls, and the privileges usually accorded to them in the practice of nations, for further authorities see Twiss's Law of Nations, i. 318. Woolsey's Introd. § 95, 96. Phillimore's Intern. Law,⁽¹⁾ 240-275. Heffter's Europ. Völker. [325] § 244-249. Halleck's Intern. Law, 239-267. Opinions of Attorneys-General (U. S.), vii. 22; viii. 16.⁽¹¹⁾ Martens, Guide Dipl. ch. xii. §§ 72, 79. Guide des Consuls (De Clercq et De Vallat), i. 6-16. Davis v. Packard, Peters's Rep. vii. 276. Valarino v. Thompson, Selden's Rep.⁽¹¹⁾ (N.Y.) 576. In the noted case of M. Dillon, the French consul at San Francisco, who refused to appear as a witness in a criminal proceeding, there was a conflict between the Constitution of the United States (which entitles all defendants in criminal causes to compulsory process to secure the attendance of witnesses) and the treaty with France, which exempted consuls from being compelled to appear in court as witnesses. The United States Government contended that the constitutional provision included consuls, they not being exempt by international law at the time of the adoption of the Constitution; and that a treaty provision in derogation of it was void; and proposed an amendment of the treaty. After a long correspondence, the point was settled by instructions from the French Government to its consuls to obey the subpoena in future cases. Mr. Marcy to Mr. Mason, Sept. 11, 1854, and 18th January, 1855. Notes of Mr. Mason and M. Walewski, Aug. 3 and 7, 1855. Annuaire des deux Mondes, 1853-4, p. 762; 1854-5, p. 732.

The provisions in the principal treaties of the United States respecting consuls may be found in the volumes of the United States Laws, as follows: Belgium, July 17, 1858, xii. 91. Paraguay, Feb. 4, 1859, xii. 117. China, June 18, 1858, xii. 127. Venezuela, Aug. 27, 1860, xii. 221. Bolivia, May 13, 1858, xii. 291. Japan, March 31, 1854, xi. 597; and June 17, 1857, xi. 723. Two Sicilies, Oct. 1, 1855, xi. 639. Switzerland, Nov. 25, 1850, xi. 587. Argentine Confederation, July 27, 1853, x. 237. France, Feb. 23, 1853, x. 114. Guatemala, March 3, 1849, x. 1. Great Britain, 3d July, 1815, viii. 230; March 15,⁽¹⁷⁾ 1794, Ib. 127. Netherlands, 1839, viii. 524. Prussia, 1785, viii. 98; 1799, Ib. 176; 1828, Ib. 382. Spain, Oct. 27, 1795, viii. 150. The later statutes on the subject of consuls may be found in the volumes of United States Laws, as follows: 1864, xiii. 17, 121, 305; 1863, xii. 737-8; 1862, Ib. 335; 1861, Ib. 285; 1860, Ib. 72, 79; 1856, xi. 55-65; 1855, x. 619-626.]—D.

[¹ Insert vol. ii before 240-275.]—G.G.W.

[¹¹ Insert 3 before Selden's Rep.]—G.G.W.

[¹⁷ For March 15 read November 19.]—G.G.W.

[¹¹ For 16 read 169.]—G.G.W.

the successor of the deceased sovereign to the prince at whose court the minister resides. In the latter case, he [326] is provided with new letters of credence; but where there is reason to believe that the mission will be suspended for a short time only, a negotiation already commenced may be continued with the same minister confidentially *à spe rati*.¹³⁶

5. When the minister, on account of any violation of the law of nations, or any important incident in the course of his negotiation, assumes on himself the responsibility of declaring his mission terminated.

6. When, on account of the minister's misconduct or the measures of his government, the court at which he resides thinks fit to send him away without waiting for his recall.¹³⁷

7. By a change in the diplomatic rank of the minister.

When, by any of the circumstances above mentioned, the minister is suspended from his functions, and in whatever manner his mission is terminated, he still remains entitled to all the privileges of his public character until his return to his own country.^(a)

§ 251. A formal letter of recall must be sent to the minister by his government: 1. Where the object of his mission has been accomplished, or has failed. 2. Where he is recalled from motives which do not affect the friendly relations of the two governments. Letter of recall.

In these two cases, nearly the same formalities are observed as on the arrival of the minister. He delivers a copy of his letter of [327] recall to the minister of foreign affairs, and asks an audience of the sovereign, for the purpose of taking leave. At this audience the minister delivers the original of his letter of recall to the sovereign, with a complimentary address adapted to the occasion.

If the minister is recalled on account of a misunderstanding

[¹³⁶ In the United States, and in other constitutional republics, no change or interruption of the functions of diplomatic agents takes place upon the death of the chief magistrate, or the expiration of his term of office and the inauguration of his successor.]—D.

[¹³⁷ It is understood that the ambassador must be *persona grata* to the State or sovereign to whom he is accredited. Although there be no misconduct that entitles the sovereign to dismiss him, still it is no just cause of offence if he object to a particular person as ambassador, on grounds short of misconduct, and merely for the reason that he is a person with whom, from whatever cause, diplomatic or personal relations cannot be agreeably or advantageously maintained. It has been claimed by European sovereigns that they cannot be expected to receive, as a diplomatic agent, a former subject, naturalized in the United States, and that special agreement to receive him should precede his arrival at their court. The principal uses of foreign ministers objected to by the United States and recalled, are those of M. Genet 1793-4 (Wait's Am. State Papers, i. 137, 490), of Mr. Jackson in 1809 (Ib. vii. 283, 295; United States Laws, ii. 613⁽¹⁾), of Sir John Crampton in 1856 (Mr. Marcy to Mr. Dallas, June 16, 1856, Ann. Reg. 1856, p. 277; Ex. Doc. House of Rep. 34th Cong. No. 107), and of M. Poussin in 1849 (Annuaire,⁽¹¹⁾ 1849, p. 665).]—D.

(a) Martens, Manuel Diplomatique, ch. 7, § 59; ch. 2, § 15. Précis, &c., liv. vii. ch. 9,⁽¹¹¹⁾ 239. Vattel, liv. iv. ch. 9, § 126.

[¹ For 613 read 612.]—G.G.W.

[¹¹ For Annuaire read Annuaire Historique Universel.]—G.G.W.

[¹¹¹ For ch. 9 read ch. 10.]—G.G.W.

between the two governments, the peculiar circumstances of the case must determine whether a formal letter of recall is to be sent to him, or whether he may quit the residence without waiting for it; whether the minister is to demand, and whether the sovereign is to grant him, an audience of leave.

Where the diplomatic rank of the minister is raised or lowered, as where an envoy becomes an ambassador, or an ambassador has fulfilled his functions as such, and is to remain as a minister of the second or third class, he presents his letter of recall, and a letter of credence in his new character.

Where the mission is terminated by the death of the minister, his body is to be decently interred, or it may be sent home for interment; but the external religious ceremonies to be observed on this occasion depend upon the laws and usages of the place. The secretary of legation, or, if there be no secretary, the minister of some allied power, is to place the seals upon his effects, and the local authorities have no right to interfere, unless in case of necessity. All questions respecting the succession *ab intestato* to the minister's movable property, or the validity of his testament, are to be determined by the laws of his own country. His effects may be removed from the country where he resided, without the payment of any *droit d'aubaine* or *détraction*.

Although in strictness the personal privileges of the minister expire with the termination of his mission by death, the custom of nations entitles the widow and family of the deceased minister, together with their domestics, to a continuance, for a limited period, of the same immunities which they enjoyed during his lifetime.

It is the usage of certain courts to give presents to foreign ministers on their recall, and on other special occasions. Some governments prohibit their ministers from receiving such presents. Such was formerly the rule observed by the Venetian Republic, and such is now the law of the United States.(a)

[328] CHAPTER II

RIGHTS OF NEGOTIATION AND TREATIES

§ 252. THE power of negotiating and contracting public treaties between nation and nation exists in full vigor in every sovereign State which has not parted with this portion of its sovereignty, or agreed to modify its exercise by compact with other States.

Faculty of
contracting
by treaty,
how limited
or modified.

Semi-sovereign or dependent States have, in general, only a limited faculty of contracting in this manner; and even sovereign and independent States may restrain or modify this faculty by treaties of

(a) Martens, Précis, &c., liv. vii. ch. 10, §§ 240-245. Manuel Diplomatique, ch. 7, §§ 60-65.

alliance or confederation with others. Thus the several States of the North American Union are expressly prohibited from entering into any treaty with foreign powers, or with each other, without the consent of the Congress; whilst the sovereign members of the Germanic Confederation retain the power of concluding treaties of alliance and commerce, not inconsistent with the fundamental laws of the Confederation.(a)

The constitution or fundamental law of every particular State must determine in whom is vested the power of negotiating and contracting treaties with foreign powers. In absolute, and even in constitutional monarchies, it is usually vested in the reigning sovereign. In republics, the chief magistrate, senate, or executive council is intrusted with the exercise of this sovereign power.

§ 253. No particular form of words is essential to the conclusion and validity of a binding compact between nations. The mutual consent of the contracting parties may be given expressly or tacitly; and in the first case, either verbally or in writing. It may be expressed by an instrument signed by the plenipotentiaries of both parties, or by a declaration, and counter declaration, or in the form of letters or notes exchanged between them. But modern usage requires that verbal agreements should be, as soon as possible, reduced to writing in order to avoid disputes; and all mere verbal communications preceding the final signature of a written convention are considered as merged in the instrument itself. The consent of the parties may be given tacitly, in the case of an agreement made under an imperfect authority, by acting under it as if duly concluded.(a)

Form of treaty.

§ 254. There are certain compacts between nations which are concluded, not in virtue of any special authority, but in the exercise of a general implied power confided to certain public agents, as incidental to their official stations. Such are the official acts of generals and admirals, suspending or limiting the exercise of hostilities within the sphere of their respective military or naval commands, by means of special licenses to trade, of cartels for the exchange of prisoners, of truces for the suspension of arms, or capitulations for the surrender of a fortress, city, or province. These conventions do not, in general,

Cartels, truces, and capitulations.

(a) See *ante*, §§ 39-58.

(a) Martens, *Précis*, liv. ii. ch. 2, §§ 49, 51, 65. Heffter, § 87.

The Roman civilians arranged all international contracts into three classes. 1. *Pactiones*. 2. *Sponsiones*. 3. *Fœdera*. The latter were considered the most solemn; and Gaius, in the recently discovered fragments of his *Institutes*, speaking of the supposition of a treaty of peace concluded in the simple form of a mere *pactio*, says: 'Dicitur⁽¹⁾ uno casu hoc verbo (Spondeo) peregrinum quoque obligari posse, velut si Imperator noster Principem alicujus peregrini populi de pace ita interroget PACEM FUTURAM SPONDES? vel ipse eodem modo, interrogetur: quod nimium subtiliter dictum est, quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed jure belli res vindicatur.' Comm. iii. § 94.

[¹ For Dicitur read Unde dicitur.]—G.G.W.

require the ratification of the supreme power of the State, unless such a ratification be expressly reserved in the act itself.(a)

Sponsions. § 255. Such acts or engagements, when made without authority, or exceeding the limits of the authority under which they purport to be made, are called *sponsions*. These conventions must be confirmed by express or tacit ratification. The former is given in positive terms, and with the usual forms; the latter is implied from the fact of acting under the agreement as if bound by its stipulations. Mere silence is not sufficient to infer a ratification by either party, though good faith requires that the party refusing it should notify its determination to the other party, in order to prevent the latter from carrying its own part of the agreement into effect. If, however, it has been totally or partially executed by either party, acting in good faith upon the supposition [330] that the agent was duly authorized, the party thus acting is entitled to be indemnified or replaced in his former situation.(a)

Full-power and ratification. § 256. As to other public treaties: in order to enable a public minister or other diplomatic agent to conclude and sign a treaty with the government to which he is accredited, he must be furnished with a *full-power*, independent of his general *letter of credence*.

Opinions of Grotius and Puffendorf. § 257. Grotius, and after him Puffendorf, consider treaties and conventions, thus negotiated and signed, as binding upon the sovereign in whose name they are concluded, in the same manner as any other contract made by a duly authorized agent binds his principal, according to the general rules of civil jurisprudence. Grotius makes a distinction between the procuration which is communicated to the other contracting party, and the instructions which are known only to the principal and his agent. According to him, the sovereign is bound by the acts of his ambassador, within the limits of his patent full-power, although the latter may have transcended or violated his secret instructions.(a)

This opinion of the earlier public jurists, founded upon the analogies of the Roman law respecting the contract of mandate or commission, has been contested by more recent writers.

Opinion of Bynkershoek. § 258. Bynkershoek lays down the true principles applicable to this subject, with that clearness and practical precision which distin-

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 22, §§ 6-8. Vattel, Droit des Gens, liv. ii. ch. 14, § 207.

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 16; lib. iii. cap. 22, §§ 1-3. Vattel, Droit des Gens, liv. ii. ch. 14, §§ 209-212. Rutherford's Inst. b. ii. ch. 9, § 21.

(a) 'Et in generali præpositione accidere potest ut nos obliget qui præpositus est, agendo contra voluntatem nostram sibi soli significatam: quia hi⁽¹⁾ distincti sunt actus volendi: unus quo nos obligamus ratum habituros quicquid ille in tali negotiorum genere fecerit; alter, quo illum nobis obligamus, ut non agat nisi ex præscripto, sibi non aliis cognito. Quod notandum est ad ea quæ legati promittunt pro regibus ex vi instrumenti procuratorii, excedendo arcana mandata.' Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 11, § 12. Puffendorf, de Jur. Naturæ et Gent. lib. iii. cap. 9, § 2.

[¹ For hi read hic.]—G.G.W.

guish the writings of that great public jurist. In the second book of his *Quæstiones Juris Publici*, (cap. vii.) he propounds the question, whether the sovereign is bound by the acts of his minister, contrary to his secret instructions. According to him, if the question were to be determined by the ordinary rules of private law, it is certain that the principal is not bound where the agent exceeds his powers. But in the case of an ambassador, we must distinguish between the general [331] full-power which he exhibits to the sovereign to whom he is accredited, and his special instructions, which he may, and generally does retain, as a secret between his own sovereign and himself. He refers to the opinion of Albericus Gentilis, (*de Jure Belli*, lib. iii. cap. xiv.) and that of Grotius above cited, that if the minister has not exceeded the authority given in his patent credentials, the sovereign is bound to ratify, although the minister may have deviated from his secret instructions. Bynkershoek admits that if the credentials are special, and describe the particulars of the authority conferred on the minister, the sovereign is bound to ratify whatever is concluded in pursuance of this authority. But the credentials given to plenipotentiaries are rarely special, still more rarely does the secret authority contradict the public full-power, and most rarely of all does a minister disregard his secret instructions.(a) But what if he should disregard them? Is the sovereign bound to ratify in pursuance of the promise contained in the full-power? According to Bynkershoek, the usage of nations, at the time when he wrote, required a ratification by the sovereign to give validity to treaties concluded by his minister, in every instance, except in the very rare case where the entire instructions were contained in the patent full-power. He controverts the position of Wicquefort, (*L'Ambassadeur et ses Fonctions*, liv. ii. § 15,) condemning the conduct of those princes who had refused to ratify the acts of their ministers on the ground of their contravening secret instructions. The analogies of the Roman law, and the usages of the Roman people, were not to be considered as an unerring guide in this matter, since time had gradually worked a change in the usage of nations, which constitutes the law of nations; and Wicquefort himself, in another passage, had admitted the necessity of a ratification to give validity to the acts of a minister under his full-power.(b) Bynkershoek [332] does not, however, deny that, if

(a) 'Sed rarum est, quod publica mandata sint specialia, rarius, quod arcanum mandatum publico sit contrarium, rarissimum verò, quod legatus arcanum posterius spernat, et ex publico priori rem agat.' Bynkershoek, *Quæst. Jur. Pub.* lib. ii. cap. 7.

(b) 'Sed quod olim obtinuit, nunc non obtinet, ut mores gentium sæpe solent mutari, nam postquam ratihabitionum usus invaluit, inter gentes tantum non omnes receptum est, ne foedera et pacta, a legatis inita, valerent, nisi ea probaverint principes, quorum res agitur. Ipse Wicquefort (eodem opere, lib. i. § 16), necessitatem ratihabitionum satis agnoscit hisce verbis: Que les pouvoirs, quelques amples et absolus qu'ils soient, aient toujours quelque relation aux ordres secrets qu'on leur donne, qui peuvent être changés et altérés, et qui le sont souvent, selon les conjonctures et les révolutions des affaires.' Ibid.

the minister has acted precisely in conformity with his patent full-power, which may be special, or his secret instructions, which are always special, even the sovereign is bound to ratify his acts, and subjects himself to the imputation of bad faith if he refuses. But if the minister exceed his authority, or undertake to treat points not contained in his full-power and instructions, the sovereign is fully justified in delaying, or even refusing his ratification. The peculiar circumstances of each particular case must determine whether the rule or the exception ought to be applied.^(c)

Opinion of
Vattel.

§ 259. Vattel considers the sovereign as bound by the acts of his minister, within the limits of his credentials, unless the power of ratifying be expressly reserved, according to the practice already established at the time when he wrote.

‘Sovereigns treat with each other through the medium of their attorneys or agents, who are invested with sufficient powers for the purpose, and are commonly called plenipotentiaries. To their office we may apply all the rules of natural law which respect things done by commission. The rights of the agent are determined by the instructions that are given him. He must not deviate from them; but every promise which he makes, within the terms of his commission, and within the extent of his powers, binds his constituent.

‘At present, in order to avoid all danger and difficulty, princes reserve to themselves the power of ratifying what has been concluded in their name by their ministers. The full-power is but a *procuracion cum libera*. If this procuracion were to have its full effect, they could not be too circumspect in giving it. But as princes cannot be compelled to fulfil their engagements otherwise than by force of arms, it is customary to place no dependence on [333] their treaties until they have agreed to and ratified them. Thus, as every agreement made by the minister remains invalid until sanctioned by the ratification of the prince, there is less danger in giving the minister a full-power. But before a sovereign can honorably refuse to ratify that which has been concluded in virtue of a full-power, he must have strong and solid

(c) ‘Non tamen negaverim, si legatus publicum mandatum, quod forte speciale est, vel arcanum, quod semper est speciale, examussum sequutus, fœdera et pacta ineat, justi principis esse ea probare, et, nisi probaverit, malæ fidei reum esse, simulque legatum⁽¹⁾ ludibrio; sin autem mandatum excesserit, vel fœderibus et pactis nova quædam sint inserta, de quibus nihil mandatum erat, optimo jure poterit princeps vel differe ratihabitionem, vel plane negare. Secundum hæc damnaverim vel probaverim negatas ratihabitiones, de quibus prolixè agit Wicquefort, (lib. ii. § 15.) In singulis causis, quas ipse ibi recenset, ego nolim judex sedere, nam plurimum facti habent, quod me latet, et forte ipsum latuit. Non immeritò autem nunc gentibus placuit ratihabitio, cum mandata publica, ut modo dicebam, vix unquam sint specialia, et arcana legatus in scriniis suis servare solent,⁽¹¹⁾ neque adeo de his quicquam rescire possint, quibuscum actum est.’ Ibid.

[¹ Insert exponere after legatum.]—G.G.W.

[¹¹ For solent read soleat.]—G.G.W.

reasons, and, in particular, he must show that his minister has deviated from his instructions.'^(a)

The slightest reflection will show how wide is the difference between the power given by sovereigns to their ministers to negotiate treaties respecting vast and complicated international concerns, and that given by an individual to his agent or attorney to contract with another in his name respecting mere private affairs. The acts of public ministers under such full-powers have been considered from very early times as subject to ratification.^(b)

§ 260. The reason on which this practice is founded is clearly explained by a veteran diplomate⁽¹⁾ whose long experience gives additional weight to his authority. 'The forms in which one State negotiates with another,' says Sir Robert Adair, 'requiring, for the sake of the business itself, that the powers to transact it should be as extensive and general as words can render them, it is usual so to draw them up, even to a promise to ratify; although, in practice, the non-ratification of preliminaries is never considered to be a contravention of the law of nations. The reason is plain. A plenipotentiary, to obtain credit with a State on an equality with his master, must be invested with powers to do, and agree to, all that could be done and agreed to by his master himself, even to the alienating the best part of his territories. But the exercise of these vast powers, always under the [334] understood control of non-ratification, is regulated by his instructions.'^(a)

Opinion of
Sir Robert
Adair.

§ 261. The exposition of the approved practice of nations, from which alone the law of nations applicable to this matter can be deduced, conclusively shows that a full-power, however general, and even extending to a promise to ratify, does not involve the obligation of ratifying in a case where the plenipotentiary has deviated from his instructions. Yet the contrary doctrine, inferred, as we have seen, by the earlier public jurists, from the analogies of private law in respect to the obligation of contracts, concluded by procuration, is countenanced by a modern writer of no inconsiderable merit. Klüber asserts that 'public treaties can only be concluded in a valid manner by the ruler of the

Opinion of
Klüber.

(a) Vattel, *Droit des Gens*, liv. ii. ch. 12, § 156.

(b) One of the earliest recorded examples of this practice was given in the treaty of peace concluded, in 561, by the Roman Emperor Justinian, with Cosroes I., King of Persia. Both the preliminaries and the definitive treaty, signed by the respective plenipotentiaries, were subsequently ratified by the two monarchs, and the ratifications formally exchanged. Barbeyrac, *Histoire des Anciens Traités*, Partie II. p. 295.

It has been very justly observed that this example of the exchange of formal ratifications, at a period of the world like that of Justinian, which invented nothing, but only collected and followed the precedents of the preceding ages, is conclusive to show that this sanction was then deemed necessary by the general usage of nations to give validity to treaties concluded under full powers. Wurm, *die Ratification von Staatsverträgen*, *Deutsche Vierteljahrs-Schrift*, Nr. 29.

(a) Adair, *Mission to the Court of Vienna*, p. 54.

[¹ For diplomate *read* diplomat.]—G.G.W.

State, who represents it towards foreign nations, either immediately by himself, or through the agency of plenipotentiaries, and in a manner conformable to the constitutional laws of the State. A treaty concluded by such a plenipotentiary is valid, provided he has not transcended his patent full-power; and a subsequent ratification is only required in the case where it is expressly reserved in the full-power, or stipulated in the treaty itself, as is usually the case at present in all those conventions which are not, such as military arrangements are, of urgent necessity. The ratification by one of the contracting parties does not bind the other party to give his in return. Except in the case of special stipulations, a treaty is deemed to take effect from the time of the signature, and not from that of the ratification. A simple sponson, an engagement entered into for the State, whether made by the representative of the State or his agent, unless he has full authority for making it, is not binding, except so far as it is ratified by the State. The question whether a treaty, made in the name of the State, by the chief of the government with the enemy, while the former is a prisoner of war, is binding on the State, or whether it is to be regarded even as a sponson, has given rise to serious disputes.’(a)

Opinion of
Martens.

§ 262. Martens concurs with Klüber so far as to admit, that what he calls the universal law of nations, ‘does not require a special ratification to render obligatory the engagement [335] of a minister acting within the limits of his full-power, on the faith of which the other contracting party has entered into negotiation with him, even if the minister has transcended his secret instructions.’ But he very correctly adds, that ‘the positive law of nations, considering the necessity of giving to negotiators very extensive full-powers, has required a special ratification so as not to expose the State to the irreparable injury which the inadvertence or bad faith of a subordinate authority might occasion it; so that treaties are only relied on when ratified. But the reason of this usage, which may be traced back to the remotest time, sufficiently shows, that if one of the two parties duly offers his ratification, the other party cannot refuse his in return, except so far as his agent may have transcended the limits of his instructions, and consequently is liable to punishment; and that, at least regularly, it does not depend upon the unlimited discretion of one nation to refuse its ratification by alleging mere reasons of convenience.’(a)

Martens remarks, in a note to the third edition of his work, published after Klüber’s had appeared, that the latter is of a contrary opinion, as to the obligation of one party to exchange ratifications when proposed by the other; ‘and as he (Klüber) considers the ratification as necessary only where it is reserved in the full-power, or in the treaty itself, (which is at present rarely omitted,) it seems that this author

(a) Klüber, *Droit des Gens Moderne de l’Europe*, § 142. (a) Martens, *Précis*, &c., § 48.

deduces from this reservation the right of arbitrarily refusing the ratification, *which I doubt.*'(b)

This observation of Martens appears to be founded on a misapprehension of the meaning of Klüber, into which we had ourselves inadvertently fallen, in the first edition of this work. Although he has not, perhaps, guarded his meaning with sufficient caution, further examination has convinced us that neither Klüber, nor any other institutional writer, has laid down so lax a principle, as that the ratification of a treaty, concluded in conformity with a full-power, may be refused at the mere caprice of one of the contracting parties, and without assigning strong and solid reasons for such refusal.

The expressions used by Vattel, that 'before a sovereign can honorably refuse to ratify that which has been concluded in virtue [336] of a full-power, he must have strong and solid reasons, and in particular, he must show that his minister has deviated from his instructions,' may seem to imply that he considered such deviation as a necessary ingredient in the strong and solid reasons to be alleged for refusing to ratify. But several classes of cases may be enumerated, in which, it is conceived, such refusal might be justified, even where the minister had not transcended or violated his instructions. Among these the following may be mentioned:—

§ 263. 1. Treaties may be avoided, even subsequent to ratification, upon the ground of the impossibility, physical or moral, of fulfilling their stipulations. Physical impossibility is where the party making the stipulation is disabled from fulfilling it for want of the necessary physical means depending on himself. Moral impossibility is where the execution of the engagement would affect injuriously the rights of third parties. It follows, in both cases, that if the impossibility of fulfilling the treaty arises, or is discovered previous to the exchange of ratifications, it may be refused on this ground.

Justifications of refusal to ratify.

2. Upon the ground of mutual error in the parties respecting a matter of fact, which, had it been known in its true circumstances, would have prevented the conclusion of the treaty. Here, also, if the error be discovered previous to the ratification, it may be withheld upon this ground.

3. In case of a change of circumstances, on which the validity of the treaty is made to depend, either by an express stipulation, (*clausula rebus sic stantibus*), or by the nature of the treaty itself. As such a change of circumstances would avoid the treaty, even after ratification, so if it take place previous to the ratification, it will afford a strong and solid reason for withholding that sanction.

§ 264. Every treaty is binding on the contracting parties from the date of its signature, unless it contain an express stipulation to the

From what event binding.

(b) Martens, 3d edit., note f.

contrary. The exchange of ratifications has a retroactive effect, confirming the treaty from its date.^(a)

The recent interference of four of the great European powers in [337] the internal affairs of the Ottoman Empire affords a remarkable example of a treaty concluded by plenipotentiaries, which was not only held to be completely binding between the contracting parties, but the execution of which was actually commenced before the exchange of ratifications. Such was the case with the Convention of the 15th July, 1840, between Austria, Great Britain, Prussia, Russia, and Turkey. In the secret protocol annexed to the treaty, it was stated that, on account of the distance which separated the respective courts from each other, the interests of humanity, and weighty considerations of European policy, the plenipotentiaries, in virtue of their full powers, had agreed that the preliminary measures should be immediately carried into execution, and without waiting for the exchange of ratifications, consenting formally by the present act, and with the assent⁽¹¹⁾ of their courts, to the immediate execution of these measures.⁷

This anomalous case may, at first sight, seem to contradict the principles above stated, as to the necessity of a previous ratification, to give complete effect to a treaty concluded by plenipotentiaries. But further reflection will show the obvious distinction which exists between a declaration of the plenipotentiaries, authorized by the instructions of their respective courts, dispensing by mutual consent with the previous ratification and a demand by one of the contracting parties, that the treaty should be carried into execution, without waiting for the ratification of the other party.^(b)

The treaty-making power dependent on the municipal constitution.

§ 265. The municipal constitution of every particular State determines in whom resides the authority to ratify treaties negotiated and concluded with foreign powers, so as to render them obligatory upon the nation. In absolute monarchies, it is the prerogative of the sovereign himself to confirm the act of his plenipotentiary by his final sanction. In certain limited or constitutional monarchies, the consent of the legislative power of the nation is, in some cases, required for that purpose. In some republics, as in that of the United States of America, the advice and consent of the Senate are essential, to enable the chief executive magistrate to pledge the national faith in this form. In all these cases, it is, consequently, an implied condition in negotiating with foreign powers, that the [338] treaties concluded by the executive

(a) Martens, Précis, &c., § 48. Essai concernant les Armateurs, &c., § 48.⁽¹⁾ Klüber, Droit des Gens Moderne de l'Europe, § 48.⁽¹¹⁾ Heffter, das europäische Völkerrecht, § 87.

(b) Murhard, Nouveau Recueil Général, tom. i. p. 163.

[¹ For § 48 read § 41.]—G.G.W.

[¹¹ Insert quotation mark before of their courts.]—G.G.W.

[¹¹ For § 48 read § 142.]—G.G.W.

government shall be subject to ratification in the manner prescribed by the fundamental laws of the State.¹³⁸

'He who contracts with another,' says Ulpian, 'knows, or ought to know, his condition.' *Qui cum alio contrahit, vel est, vel debet esse non ignarus conditionis ejus*, (l. 19, D. de div. R. J. 50, 17.) But, in practice, the full powers given by the government of the United States to their plenipotentiaries always expressly reserve the ratification of the treaties concluded by them, by the President, with the advice and consent of the Senate.

§ 266. The treaty, when thus ratified, is obligatory upon the contracting States, independently of the auxiliary legislative measures, which may be necessary on the part of either, in order to carry it into complete effect. Where, indeed, such auxiliary legislation becomes necessary, in consequence of some limitation upon the treaty-making power, expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional powers,—such, for example, as a prohibition of alienating the national domain,—then the treaty may be considered as imperfect in its obligation, until the national assent has been given in the forms required by the municipal constitution. A general power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made; and, among these, may properly be included the cession of the public territory and other property, as well as of private property included in the eminent domain annexed to the national sovereignty. If there be no limitation expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional authorities on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary or expedient.^(a)

Auxiliary legislative measures, how far necessary to the validity of a treaty.

Commercial treaties, which have the effect of altering the existing laws of trade and navigation of the contracting parties, may require the sanction of the legislative power in each State for their execution. Thus the commercial treaty of Utrecht, between France and Great

[¹³⁸ For this reason, the representatives of the United States are not willing to sign or receive declarations or other notes in connection with a treaty. If such notes can possibly affect the treaty, they should be communicated to the Senate, as part of the compact. (Mr. Adams to Earl Russell, Aug. 23, 1861, on the declaration proposed to be attached to the convention on the subject of the Declarations of Paris; U. S. Dipl. Corr. 1861, p. 136. See also Mr. Cass to Mr. Sandford, Oct. 22, 1859, Sen. Ex. Doc. 36th Cong. 2d Sess. No. 10. President Polk's message of Feb. 8, 1849, Cong. Globe, 1849, p. 486.) This subject was also discussed in connection with the Clayton-Bulwer Treaty, where the British Minister, in exchanging ratifications, sent a note of explanation to Mr. Clayton, to which the latter replied. Sen. Ex. Doc. No. 12, 32d Cong. 2d. Sess. Also, Mr. Wheaton's letter to the State Department, of 8th July, 1840, respecting the treaty with Hanover.]—D.

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 7. Vattel, Droit des Gens, liv. i. ch. 20, § 244; ch. 2, ⁽¹⁾ §§ 262–265. Kent's Comm. i. 164.

[¹ For ch. 2 read ch. 21.]—G.G.W.

Britain, by which the trade between the two countries was to be placed on the footing of reciprocity, was never carried into effect; the British Parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of the treaty.^(b) In treaties requiring the appropriation of moneys for their execution, it is the usual practice of the British government to stipulate that the King will recommend to Parliament to make the grant necessary for that purpose. Under the Constitution of the United States, by which treaties made and ratified by the President, with the advice and consent of the Senate, are declared to be 'the supreme law of the land,' it seems to be understood that the Congress is bound to redeem the national faith thus pledged, and to pass the laws necessary to carry the treaty into effect.^(c)¹³⁹

Freedom of consent, how far necessary to the validity of treaties.

[340] § 267. By the general *principles* of private jurisprudence, recognized by most, if not all, civilized countries, a contract obtained by violence is void. Freedom of consent is essential to the validity of every agreement, and contracts obtained under duress are void, because the general welfare of society requires that they should be so. If they were binding, the timid would constantly be forced by threats, or by violence, into a surrender of their just rights. The notoriety of the rule that such engagements are void, makes the attempt to extort them among the rarest of human crimes. On the other hand, the welfare of

(b) Lord Mahon's History of England from the Peace of Utrecht, i. 24.

(c) Kent's Comm. i. 285.

[¹³⁹ In further illustration of this point, see the following: Foster v. Neilson, Peters's Rep. ii. 314. United States v. Arredondo, Peters's Rep. vi. 735. Cong. Globe, 1853-4, App. p. 1020; and 1855-6, pp. 528, 599, 1173. Wheaton's Life of Pinkney, 517-549. Annual Reg. 1834, p. 361. U. S. Laws, iii. 354. Mr. Wheaton to the Attorney-General, 20th January, 1835. Opinions of Attorn.-Gen. vi. 291. Heffter's Europ. Völker. § 94. Phillimore's Intern. Law, (¹) ch. 6. Halleck's Intern. Law, 191.

As a matter of international law, there is no doubt, that, if the treaty-making department of a nation concludes a treaty by which it is agreed that certain things are to be done, the nation is bound; and it is no answer to the other nation, in case of a breach of the contract, to set up a failure of a different department of the government to conform to the treaty. That amounts to no more than giving the internal municipal history of the breach. The distribution of powers a nation chooses to make, in its own constitution of government, furnishes no excuse for a failure of the nation to do what it has contracted to do. As matter of constitutional law, it follows from the above statement that each department of a government must discharge its appropriate function towards the performance of whatever the nation has bound itself to do. (Kent's Comm. 410.) If the consent of a local or subordinate authority is necessary to give effect to any part of a treaty, that should appear in the treaty itself. In the United States, it is settled that Congress is under an obligation to execute all treaties. A refusal by Congress to pass the necessary legislative acts [340] is a national breach of the treaty, and may be so regarded by the other party. This was settled in Washington's administration, in the case of the vote of the appropriations required by the Jay Treaty of 1794. The United States took the same ground as to France, in 1834, when the French Chamber of Deputies failed to vote the supplies necessary to pay the American indemnities. The judiciary of the United States must always regard treaties, not as mere political contracts, but as law; for they are made such, in terms, by the Constitution.]—D.

[¹ Insert vol. ii before ch. 6.]—G.G.W.

society requires that the engagements entered into by a nation under such duress as is implied by the defeat of its military forces, the distress of its people, and the occupation of its territories by an enemy, should be held binding; for if they were not, wars could only be terminated by the utter subjugation and ruin of the weaker party. Nor does inadequacy of consideration, or inequality in the conditions of a treaty between nations, such as might be sufficient to set aside a contract as between private individuals on the ground of gross inequality or enormous lesion, form a sufficient reason for refusing to execute the treaty.^(a)

§ 268. General compacts between nations may be divided into what are called *transitory conventions*, and *treaties* properly so termed. The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties; and although their operation may, in some cases, be suspended during war, they revive on the return of peace without any express stipulation. Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favor of one nation within the territory of another.^(a)

Transitory
conventions
perpetual in
their nature

[341] Thus the treaty of peace of 1783, between Great Britain and the United States, by which the independence of the latter was acknowledged, prohibited future confiscations of property; and the treaty of 1794, between the same parties, confirmed the titles of British subjects holding lands in the United States, and of American citizens holding lands in Great Britain, which might otherwise be forfeited for alienage. Under these stipulations, the Supreme Court of the United States determined, that the title both of British natural subjects and of corporations to lands in America was protected by the treaty of peace, and confirmed by the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding, for alienage. Even supposing the treaties were abrogated by the war which broke out between the two countries in 1812, it would not follow that the rights of property already vested under those treaties could be divested by supervening hostilities. The extinction of the treaties would no more extinguish the title to real property acquired or secured under their stipulations than the repeal of a municipal law affects rights of property vested under its provisions.¹⁴⁰ But independent of this incontestable principle, on which the security of

(a) Senior, Edinburgh Rev. No. CLVI. art. 1. Martens, Précis, &c., liv. ii. ch. 2, §§ 50, 52. Grotius, de Jur. Bel. ac Pac. lib. ii. sect. xiv. §§ 4-12.

(a) Vattel, Droit des Gens, liv. ii. ch. 12, § 192. Martens, Précis, &c., liv. ii. ch. 2, § 58.

[¹⁴⁰ See Chirac v. Chirac, Wheaton's Rep. ii. 277.]—D.

[¹ For sect. read ch.]—G.G.W.

all property rests, the court was not inclined to admit the doctrine that treaties become, by war between the two contracting parties, *ipso facto* extinguished if not revived by an express or implied renewal on the return of peace. Whatever might be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to the subject, it was satisfied that the doctrine contended for was not universally true. There might be treaties of such a nature as to their object and import, as that war would necessarily put an end to them; but where treaties contemplated a permanent arrangement of territory, and other national rights, or in their terms were meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by war. If such were the law, even the treaty of 1783, so far as it fixed the limits of the United States, and acknowledged their independence, would be gone, and they would have had again to struggle for both, upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all [342] reasoning. The court, therefore, concluded that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, revive upon the return of peace.^(b)¹⁴¹

Controversy
between the
American
and British
governments
respecting
the rights of
fishery on
the coasts of
the British
dominions
in North
America.

§ 269. By the 3d article of the treaty of peace of 1783, between the United States and Great Britain, it was 'agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulph of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used at any time heretofore to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island); and also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours and creeks of Nova-Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement,

(b) *The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven*, Wheaton's Rep. viii. 464. The same principle was asserted by the English Court of Chancery, as to American citizens holding lands in Great Britain under the treaty of 1794, in *Sutton v. Sutton, Russell & Milne's* (1) Rep. i. 663.

[¹⁴¹ See also Phillimore's Intern. Law, iii. 671. Twiss's Law of Nations, i. 356.]—D.

[¹ For Milne's read Mylne's.]—G.G.W.

without a previous agreement for that purpose with the inhabitants, proprietors or possessors of the ground.'⁽¹⁾

§ 270. During the negotiation at Ghent, in 1814, the British plenipotentiaries gave notice that their government 'did not intend to grant to the United States, gratuitously, the privileges formerly granted by treaty to them of fishing within the limits of the British sovereignty, and of using the shores of the British territories for purposes connected [343] with the British fisheries.' In answer to this declaration the American plenipotentiaries stated that they were 'not authorized to bring into discussion any of the rights or liberties which the United States have heretofore enjoyed in relation thereto; from their nature, and from the peculiar character of the treaty of 1783, by which they were recognized, no further stipulation has been deemed necessary by the government of the United States to entitle them to the full enjoyment of them all.'

Negotiation
at Ghent.

The treaty of peace concluded at Ghent, in 1814, therefore, contained no stipulation on the subject; and the British government subsequently expressed its intention to exclude the American fishing-vessels from the liberty of fishing within one marine league of the shores of the British territories in North America, and from that of drying and curing their fish on the unsettled parts of those territories, and, with the consent of the inhabitants, within those parts which had become settled since the peace of 1783.

§ 271. In discussing this question, the American minister in London, Mr. J. Q. Adams, stated, that from the time the settlement in North America, constituting the United States, was made, until their separation from Great Britain and their establishment as distinct sovereignties, these liberties of fishing, and of drying and curing fish, had been enjoyed by them, in common with the other subjects of the British empire. In point of principle, they were pre-eminently entitled to the enjoyment; and, in point of fact, they had enjoyed more of them than any other portion of the empire; their settlement of the neighboring country having naturally led to the discovery and improvement of these fisheries; and their proximity to the places where they were prosecuted, having led them to the discovery of the most advantageous fishing grounds, and given them facilities in the pursuit of their occupation in those regions, which the remoter parts of the empire could not possess. It might be added, that they had contributed their full share, and more than their share, in securing the conquest from France of the provinces on the coasts of which these fisheries were situated.

Mr. J. Q.
Adams's
argument.

It was doubtless upon considerations such as these that an express stipulation was inserted in the treaty of 1783, recognizing the rights

[1 8 U. S. Statutes, 80.]-G.G.W.

and liberties which had always been enjoyed by the people of the United States in these fisheries, and declaring that they should continue to enjoy the right of fishing on the Grand [344] Bank, and other places of common jurisdiction, and have the liberty of fishing, and drying and curing their fish, within the exclusive British jurisdiction on the North American coasts, to which they had been accustomed whilst they formed a part of the British nation. This stipulation was a part of that treaty by which His Majesty acknowledged the United States as free, sovereign, and independent States, and that he treated with them as such.

It could not be necessary to prove that this treaty was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is considered as annulled by a subsequent war between the same parties. To suppose that it is, would imply the inconsistency and absurdity of a sovereign and independent State, liable to forfeit its right of sovereignty by the act of exercising it on a declaration of war. But the very words of the treaty attested that the sovereignty and independence of the United States were not considered as grants from His Majesty. They were taken and expressed as existing before the treaty was made, and as then only first formally recognized by Great Britain.

Precisely of the same nature were the rights and liberties in the fisheries. They were, in no respect, grants from the king of Great Britain to the United States; but the acknowledgment of them as rights and liberties enjoyed before the separation of the two countries, and which it was mutually agreed should continue to be enjoyed under the new relations which were to subsist between them, constituted the essence of the article concerning the fisheries. The very peculiarity of the stipulation was an evidence that it was not, on either side, understood or intended as a grant from one sovereign State to another. Had it been so understood, neither could the United States have claimed, nor would Great Britain have granted, gratuitously, any such concession. There was nothing, either in the state of things, or in the disposition of the parties, which could have led to such a stipulation on the part of Great Britain, as on the ground of a grant without an equivalent.

If the stipulation by the treaty of 1783, was one of the conditions by which His Majesty acknowledged the sovereignty and independence of the United States; if it was the mere recognition of rights and liberties previously existing and enjoyed, it was neither a privilege gratuitously granted, nor liable to be forfeited [345] by the mere existence of a subsequent war. If it was not forfeited by the war, neither could it be impaired by the declaration of Great Britain at Ghent, that she did not intend to renew the grant. Where there had been no gratuitous concession, there could be none to renew; the rights and

liberties of the United States could not be cancelled by the declaration of the British intentions. Nothing could abrogate them but a renunciation by the United States themselves.^(a)

§ 272. In the answer of the British government to this communication it was stated that Great Britain had always considered the liberty formerly enjoyed by the United States, of fishing within British limits and using British territory, as derived from the 3d article of the treaty of 1783, and from that alone; and that the claim of an independent State to occupy and use, at its discretion, any portion of the territory of another, without compensation or corresponding indulgence, could not rest on any other foundation than conventional stipulation. It was unnecessary to inquire into the motives which might have originally influenced Great Britain in conceding such liberties to the United States, or whether other articles of the treaty did or did not, in fact, afford an equivalent for them, because all the stipulations profess to be founded on reciprocal advantage and mutual convenience. If the United States derived from that treaty privileges, from which other independent nations not admitted by treaty were excluded, the duration of the privileges must depend on the duration of the instrument by which they were granted; and if the war abrogated the treaty, it determined the privileges. It had been urged, indeed, on the part of the United States, that the treaty of 1783 was of a peculiar character, and that, because it contained a recognition of American independence, it could not be abrogated by a subsequent war between the parties. To a position of this novel nature Great Britain could not accede. She knew of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties; she could not, therefore, consent to give her diplomatic relations with one State a different degree of permanency from that on which her connection with all other States depended. Nor could she consider any one State at liberty to assign to a treaty made with her such a peculiarity of [346] character as should make it, as to duration, an exception to all other treaties, in order to found, on a peculiarity thus assumed, an irrevocable title to indulgences which had all the features of temporary concessions.

Earl
Bathurst's
argument.

It was by no means unusual for treaties containing recognitions and acknowledgments of title, in the nature of perpetual obligation, to contain, likewise, grants of privileges liable to revocation. The treaty of 1783, like many others, contained provisions of different character; some in their own nature irrevocable, and others merely temporary. If it were thence inferred that, because some advantages specified in that treaty would not be put an end to by the war, therefore all the other advantages were intended to be equally permanent,

(a) Mr. J. Q. Adams to Earl Bathurst, Sept. 25, 1815: *American State Papers*, fol. edit. 1834, iv. 352.

it must first be shown that the advantages themselves are of the same, or at least of a similar character; for the character of one advantage, recognized or conceded by treaty, can have no connection with the character of another, though conceded by the same instrument, unless it arises out of a strict and necessary connection between the advantages themselves. But what necessary connection could there be between a right to independence and a liberty to fish within British jurisdiction, or to use British territory? Liberties within British limits were as capable of being exercised by a dependent as by an independent State; and could not, therefore, be the necessary consequence of independence.

The independence of a State could not be correctly said to be granted by a treaty, but to be acknowledged by one. In the treaty of 1783, the independence of the United States was certainly acknowledged, not merely by the consent to make the treaty, but by the previous consent to enter into the provisional articles, executed in 1782. Their independence might have been acknowledged, without either the treaty or the provisional articles; but by whatever mode acknowledged, the acknowledgment was, in its own nature, irrevocable. A power of revoking, or even of modifying it, would be destructive of the thing itself; and, therefore, all such power was necessarily renounced when the acknowledgment was made. The war could not put an end to it, for the reason justly assigned by the American Minister; because a nation could not forfeit its sovereignty by the act of exercising it; and for the further reason that Great Britain, when she declared war against the United States, gave them, by that very act, a new recognition of their independence.

[347] The *rights* acknowledged by the treaty of 1783 were not only distinguishable from the *liberties* conceded by the same treaty, in the foundation on which they stand, but they were carefully distinguished in the wording of the treaty. In the 1st article, Great Britain acknowledged an independence already expressly recognized by the other powers of Europe, and by herself in her consent to enter into the provisional articles of 1782. In the 3d article, Great Britain acknowledged the *right* of the United States to take fish on the Banks of Newfoundland and other places, from which Great Britain had no right to exclude any independent nation. But they were to have the *liberty* to cure and dry them in certain unsettled places within the British territory. If the liberties thus granted were to be as perpetual and indefeasible as the rights previously recognized, it was difficult to conceive that the American plenipotentiaries would have admitted a variation of language so adapted to produce a different impression; and, above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes,

which left a right so practical and so beneficial as this was admitted to be, dependent on the will of British subjects, proprietors, or possessors of the soil, to prohibit its exercise altogether.

It was, therefore, surely obvious that the word *right* was, throughout the treaty, used as applicable to what the United States were to enjoy in virtue of a recognized independence; and the word *liberty* to what they were to enjoy as concessions strictly dependent on the treaty itself.^(a)

§ 273. The American Minister, in his reply to this argument, disavowed every pretence of claiming for the diplomatic relations between the United States and Great Britain a degree of permanency different from that of the same relations between either of the parties and all other powers. He disclaimed all pretence of assigning to any treaty between the two nations, any peculiarity not founded in the nature of the treaty itself. But he submitted to the candor of the British government whether the treaty of 1783 was not, from the very nature of its subject-matter, and from the relations previously existing between the parties to it, peculiar? Whether it was a treaty which could have been made between Great Britain and any other nation?

Mr. Adams's
reply to Earl
Bathurst.

[348] And if not, whether the whole scope and object of its stipulations were not expressly intended to establish a new and permanent state of diplomatic relations between the two countries, which would not and could not be annulled by the mere fact of a subsequent war? And he made this appeal with the more confidence, because the British note admitted that treaties often contained recognitions in the nature of perpetual obligation; and because it implicitly admitted that the whole treaty of 1783 is of this character, with the exception of the article concerning the navigation of the Mississippi, and a small part of the article concerning the fisheries.

The position, that 'Great Britain knows of no exception to the rule, that all treaties are put an end to by a subsequent war,' appeared to the American Minister not only novel, but unwarranted by any of the received authorities upon the law of nations; unsanctioned by the practice and usages of sovereign States; suited, in its tendency, to multiply the incitements to war, and to weaken the ties of peace between independent nations; and not easily reconciled with the admission that treaties not unusually contain, together with articles of a temporary character, liable to revocation, 'recognitions and acknowledgments in the nature of perpetual obligation.'

A recognition or acknowledgment of title, stipulated by convention, was as much a part of the treaty as any other article; and if all treaties are abrogated by war, the recognitions and acknowledgments

(a) Earl Bathurst to Mr. J. Q. Adams, Oct. 30, 1815: American State Papers, fol. edit. 1834, iv. 354.

contained in them must necessarily be null and void, as much as any other part of the treaty.

If there were no exception to the rule, that war puts an end to all treaties between the parties to it, what could be the purpose or meaning of those articles which, in almost all treaties of commerce, were provided expressly for the contingency of war, and which during the peace are without operation? For example, the 10th article of the treaty of 1794, between the United States and Great Britain, stipulated that 'Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys, which they may have in the public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated.'⁽¹⁾ If war put an end to all treaties, what could the parties to this engagement intend by making it formally an article of the treaty? According to the [349] principle laid down, excluding all exception, by the British note, the moment a war broke out between the two countries this stipulation became a dead letter, and either State might have sequestered or confiscated those specified properties, without any violation of compact between the two nations.

The American Minister believed that there were many exceptions to the rule by which the treaties between nations are mutually considered as terminated by the intervention of a war; that these exceptions extend to all engagements contracted with the understanding that they are to operate equally in war and peace, or exclusively during war; to all engagements by which the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of morality and humanity; and, finally, to all engagements, which, according to the expression of the British note, are *in the nature of perpetual obligation*. To the first and second of these classes might be referred the 10th article of the treaty of 1794, and all treaties or articles of treaties stipulating the abolition of the slave-trade. The treaty of peace of 1783 belongs to the third class.

The reasoning of the British note seemed to confine this perpetuity of obligation to recognitions and acknowledgments of title, and to consider its perpetual nature as resulting from the subject-matter of the contract, and not from the engagement of the contractor. While Great Britain left the United States unmolested in the enjoyment of all the advantages, rights, and liberties stipulated in their behalf in the treaty of 1783, it was immaterial whether she founded her conduct upon the mere fact that the United States are in possession of such rights, or whether she was governed by good faith and respect for her own engagements. But if she contested any of these rights, it was to her engagements only that the United States could appeal, as the rule

[1 8 U. S. Statutes 122.]—G.G.W.

for settling the question of right. If this appeal were rejected, it ceased to be a discussion of right; and this observation applied as strongly to the recognition of independence and the boundary line, in the treaty of 1783, as to the fisheries. It was truly observed in the British note, that in that treaty the independence of the United States was not granted, but acknowledged; and it was added, that it might have been acknowledged without any treaty, and that the acknowledgment, in whatever mode, would have been irrevocable. But the independence of the United States was precisely the question upon [350] which a previous war between them and Great Britain had been waged. Other nations might acknowledge their independence without a treaty, because they had no right or claim of right to contest it; but this acknowledgment, to be binding upon Great Britain, could have been made only by treaty, because it included the dissolution of one social compact between the parties, as well as the formation of another. Peace could exist between the two nations only by the mutual pledge of faith to the new social relations established between them; and hence it was, that the stipulations to that treaty were in the nature of perpetual obligation, and not liable to be forfeited by a subsequent war, or by any declaration of the will of either party, without the assent of the other. (a)

§ 274. The above analysis of the correspondence which took place relating to this subject, has been inserted as illustrative of the general question, how far treaties are abrogated by war between the parties to them; but the particular controversy itself was finally settled between the two countries on the basis of compromise, by the convention of 1818, in which the liberty claimed by the United States in respect to the fishery within the British jurisdiction and territory was confined to certain geographical limits. (a)¹⁴²

(a) Mr. J. Q. Adams to Lord Castlereagh, Jan. 22, 1816: American State Papers, fol. edit. 1834, iv. 356.

(a) *Vide supra*, § 180.

[¹⁴² *The North-eastern Fisheries*.—Since the text was written, the Reciprocity Treaty of 1854 gave a new adjustment to the subject of the North-eastern fisheries. That treaty conceded to the fishermen of the United States the further right to take fish of all kinds, except shell-fish, 'on the sea-coast⁽¹⁾ and shores, and in the bays, harbors, and creeks, of Canada,⁽²⁾ Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore; with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish.' This liberty was restricted to sea-fishing. The salmon and shad fisheries, and all fisheries in rivers and mouths of rivers, were confined to British fishermen. Reciprocal rights were given to British fishermen on the eastern coasts of the United States north of 36° north latitude; and commissioners were to designate the places reserved from the common right of sea-fishing.

The Reciprocity Treaty, in accordance with a provision for the purpose, was terminated, after ten years, by a notice given by the President, in pursuance of an Act of Congress of 18th January, 1865 (U. S. Laws, xiii. 566). The question now arises as to the effect of the termination of this treaty upon the rights of the United States fishermen under the treaties

[¹ For sea-coast read sea-coasts.]—G. G. W.

[² Insert New Brunswick, after Canada.]—G. G. W.

Treaties, the operation of which cease in certain cases.

[351] § 275. *Treaties*, properly so called, or *fœdera*, are those of friendship and alliance, commerce, and navigation, which, even if perpetual in terms, expire of course:—

1. In case either of the contracting parties loses its existence as an independent State.

2. Where the internal constitution of government of either State is so changed, as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded.

Here the distinction laid down by institutional writers between [352] *real* and *personal* treaties becomes important. The first bind the contracting parties independently of any change in the sovereignty, or in the rulers of the State. The latter include only treaties of mere personal alliance, such as are expressly made with a view to the person of the actual ruler or reigning sovereign, and, though they bind the State during his existence, expire with his natural life or his public connection with the State.^(a)

3. In case of war between the contracting parties; unless such of 1783 and 1818. Does the termination of the Reciprocity Treaty revive the convention of 1818? If not, then is the treaty of 1783 in [351] force? If, as Great Britain contended, the fishery clauses of the treaty of 1783 were annulled by the war of 1812 and the treaty of 1814, or if they are annulled by the subsequent treaties of 1818 or 1854, then there is no treaty on the subject. We are thus brought back to the question argued by Mr. Adams with Earl Bathurst, stated at length in the text, whether the rights of the United States fishermen were mere grants from Great Britain under the treaty of 1783, to fall with it, or were rights they held as colonists, recognized by that treaty, and, once recognized, not to be taken away, except as other national rights and national domain are to be taken,—by conquest.

The meaning of the terms 'coast, bays, harbors, and creeks,' in the convention of 1818, received a construction by the mixed commission under the convention of 1853. The American fishing-schooner *Washington* was seized while fishing in the Bay of Fundy, ten miles from the shore, taken to a British port and adjudged forfeited. The ground of the judgment was, that, as the United States, by the convention of 1818, renounced the rights to take fish 'within three marine miles of any of the coasts, bays, creeks, or harbors of His Majesty's dominions,' this line of three miles must be drawn across the mouth of the Bay of Fundy, from headland to headland, in order to define the 'coast;' also, that the Bay of Fundy was one of the 'bays' from which United States fishermen were excluded. The owners of the *Washington* presented their claim for compensation to the mixed commission above referred to. The commissioners differing, the cause was left to the decision of the umpire, Mr. Joshua Bates. He decided, that, as the Bay of Fundy is from sixty-five to seventy-five miles wide, and from one hundred and thirty to one hundred and forty miles long, with several bays on its coasts known and named as bays, and has one of its headlands in the United States, which all vessels must pass bound to Passamaquoddy Bay, and one large island belonging to the United States (Little Menan, lying on the line between the headlands), the Bay of Fundy cannot be considered as an exclusively British bay, within the meaning of the treaties regulating the fisheries; nor could the 'coast' of Great Britain, under those treaties, be measured from its headlands. Compensation for an illegal condemnation was awarded to the owners. (*The Schooner Washington: Report of the Commissioners under the Convention of 1853*, pp. 170-186.) The convention of 1839, between Great Britain and France, had settled such questions as this by the following provision: 'It is agreed⁽¹⁾ that the distance of three miles, fixed as the general limit for the exclusive right of fishing upon the coasts of the two countries, shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.'—D.

(a) *Vide ante*, § 27.

[¹ For It is agreed *read* It is equally agreed.]—G.G.W.

stipulations as are made expressly with a view to a rupture, such as the period of time allowed to the respective subjects to retire with their effects, or other limitations of the general rights of war. Such is the stipulation contained in the 10th article of the treaty of 1794, between Great Britain and the United States,—providing that private debts and shares or moneys in the public funds, or in public or private banks belonging to private individuals, should never, in the event of war, be sequestered or confiscated. There can be no doubt that the obligation of this article would not be impaired by a supervening war, being the very contingency meant to be provided for, and that it must remain in full force until mutually agreed to be rescinded.^(b)¹⁴³

(b) Vattel, liv. iii. ch. 10, § 175. Kent's Comm. i. 175.

[¹⁴³ *Effect of War on Treaties*.—Halleck says, 'A declaration of war does not *ipso facto* extinguish treaties between the belligerent States. Treaties of friendship and alliance are necessarily annulled by a war between the contracting parties, except such stipulations as are made expressly with a view to a rupture, such as limitations of the general rights of war, &c. So of treaties of commerce and navigation: they are generally either suspended or entirely extinguished by a war between the parties to such treaties. All stipulations, with respect to the conduct of the war, or with respect to the effect of hostilities upon the rights and property of the citizens and subjects of the parties, are not impaired by supervening hostilities,—this being the very contingency intended to be provided for,—but continue in full force until mutually agreed to be rescinded. There are many stipulations of treaties which, although perpetual in their character, are suspended by a declaration of war, and can only be carried into effect on the return of peace.' (Intern. Law, 371; 862.) Kent says, 'As a general rule, the obligations of treaties are dissipated by hostilities. But, if a treaty contains any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when the rupture takes place. All those duties, of which the exercise is not necessarily suspended by the war, subsist in their full force.' (Commentaries, i. 420.) He refers to the tenth article of the treaty of 1794 as continuing, notwithstanding the war of 1812; it being a general provision respecting the effect of war upon private rights. In the case of the Society for the Propagation of the Gospel v. New Haven (Wheaton's Rep. viii. 464), the Supreme Court held that private rights, vested and confirmed by a treaty, are not devested on the termination of that treaty by war. The court says,⁽¹⁾ 'These [353] treaties contemplate a permanent arrangement of territorial and other national rights: . . . it would be against every principle of just interpretation to hold them extinguished by the event of war. . . . We think that⁽¹¹⁾ treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and, unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.' Woolsey considers the survival of treaty stipulations after war as a special question in each case, depending upon the nature of the stipulation and its circumstances. Not only do those survive which contemplate a war, but those which are in their nature permanent; as recognition of independence, cessions of territory, and adjustment of boundaries. (Intro. § 152.) The older text-writers made the survival of treaty rights dependent upon the origin of the war. If the war arose in the breach of the treaty, the provisions were annulled; but, if the war was what was called a new war,—that is, one arising from a cause independent of the treaty,—though the exercise of rights acquired under the treaty would be interrupted by the war, they would not be lost, unless by conquest. (Grotius, liv. iii. ch. 20, §§ 27, 28. Vattel, liv. iv. ch. 4, § 42.) Kent notices this distinction without remark. Woolsey says of it, 'This rule, which would be a very important one if admitted, and yet perhaps one attended with practical difficulties, is not, so far as we are informed, insisted on by later text-writers, nor introduced into the code of nations.' (Introduction, § 152.)

[¹ Delete quotation mark before These and insert before treaties.]—G.G.W.

[¹¹ For think that read think therefore that.]—G.G.W.

[353] 4. Treaties expire by their own limitation, unless revived by express agreement, or when their stipulations are fulfilled by the respective parties, or when a total change of circumstances renders them no longer obligatory.

Treaties
revived and
confirmed
on the re-
newal of
peace.

§ 276. Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds, which renders it frequently difficult to distinguish between those stipulations which are perpetual in their nature, and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the being of either party, and thus render the compact inapplicable to the new condition of things. It is for this reason, and from abundance of caution, that stipulations are frequently inserted in treaties of peace, expressly reviving and confirming the treaties formerly subsisting between the contracting parties, and containing stipulations of a permanent character, or in some other mode excluding the conclusion that the obligation of such antecedent treaties is meant to be waived by either party. The reiterated confirmations of the treaties of Westphalia and Utrecht, in almost every subsequent treaty of peace or commerce between the same parties, constituted a sort of written code of conventional law, by which the distribution of power and territory among the principal European States was permanently settled, until violently disturbed by the partition of Poland and the wars of the French revolution. The arrangements of territory and political relations substituted by the treaties of Vienna for the ancient conventional law of Europe, and doubtless intended to be of a similar permanent character, have already undergone, in consequence of the French, Polish, and Belgic revolutions of 1830, very important modifications, of which we have given an account in another work.^(a)

Treaties of
guaranty.

§ 277. The convention of guaranty is one of the most usual international contracts. It is an engagement by which one State promises to aid another where it is interrupted, or threatened to be disturbed, in the peaceable enjoyment of its rights, by a third power. It may be applied to every species of right and obligation that can exist between
Indeed, it seems plain that the test of survival is to be found in the nature of the provision, and not in the origin of the war. If, indeed, the war amounts to a mutual abrogation of the treaty, the rights under it cease, from that fact; but, if the war has its origin in a breach of the treaty by one party, the rights of the other under the treaty cannot be affected. They may be lost by the result of the war,—that is, by conquest,—as any other right may be; but not by the fact that the other party begins a war for the purpose of escaping the obligation of the treaty in respect to those rights. So, if a war arises from a cause independent of the treaty, the survival of any clause in the treaty must depend upon its nature, and the circumstances under which it was made. See also the debate in the House of Commons on the Declaration of Paris of 1856. Speeches of Sir George Lewis and Mr. Bright of March 11 and 17, 1862, and of the Earl of Derby of Feb. 7, 1862. Despatch of Mr. Marcy to Mr. Mason of Dec. 8, 1856. Phillimore's Intern. Law, iii. App. 21.]—D.

(a) Wheaton's Hist. Law of Nations, 435-445, 538-551.

nations; to the possession and boundaries of territories, the sovereignty of the State, its constitution of government, the right of succession, &c.; but it is most commonly applied to treaties of peace. The guaranty may also be contained in a distinct and separate convention, or included among the stipulations annexed to the principal treaty intended to be guarantied. It then becomes an accessory obligation.(a)

The guaranty may be stipulated by a third power not a party to the principal treaty, by one of the contracting parties in favor of another, or mutually between all the parties. Thus, by the treaty of peace concluded at Aix-la-Chapelle in 1748, the eight high contracting parties mutually guarantied to each other all the stipulations of the treaty.

[355] The guarantying party is bound to nothing more than to render the assistance stipulated. If it prove insufficient, he is not obliged to indemnify the power to whom his aid has been promised. Nor is he bound to interfere to the prejudice of the just rights of a third party, or in violation of a previous treaty rendering the guaranty inapplicable in a particular case. Guaranties apply only to rights and possessions existing at the time they are stipulated. It was upon these grounds that Louis XV. declared, in 1741, in favor of the Elector of Bavaria against Maria Theresa, the heiress of the Emperor Charles VI., although the court of France had previously guarantied the pragmatic sanction of that emperor, regulating the succession to his hereditary States. And it was upon similar grounds, that France refused to fulfil the treaty of alliance of 1756 with Austria, in respect to the pretensions of the latter power upon Bavaria, in 1778, which threatened to produce a war with Russia. Whatever doubts may be suggested as to the application of these principles to the above cases, there can be none respecting the principles themselves, which are recognized by all the text-writers.(b)

These writers make a distinction between a *Surety* and a *Guarantor*. Thus Vattel lays it down, that where the matter relates to things which another may do or give as well as he who makes the original promise, as, for instance, the payment of a sum of money, it is safer to demand a *surety* (caution) than a *guaranty* (garant). For the surety is bound to make good the promise in default of the principal; whereas the guarantor is only obliged to use his best endeavors to obtain a performance of the promise from him who has made it.(c)¹⁴⁴

§ 278. Treaties of alliance may be either defensive or offensive. In Treaties of alliance.

(a) Vattel, *Droit des Gens*, liv. ii. ch. 16, §§ 235-239. Klüber, *Droit des Gens Moderne de l'Europe*, Part. II, tit. 2, sect. 1, ch. 2, §§ 157, 158. Martens, *Précis*, &c. § 63.

(b) Vattel, liv. ii. ch. 16, § 238. Flassan, *Histoire de la Diplomatie Française*, tom. vii. p. 195.

(c) Vattel, § 239.

[¹⁴⁴ A statement of the principal European guaranty treaties is to be found in Phillimore's *Intern. Law*, ii. ch. 7. See also Klüber, § 157-9. Heffter, § 97. Woolsey, § 105.]—D.

the first case, the engagements of the ally extend only to a war really and truly defensive; to a war of aggression first commenced, in point of fact, against the other contracting party. In the second, the ally engages generally to [356] co-operate in hostilities against a specified power, or against any power with whom the other party may be engaged in war.

An alliance may also be both offensive and defensive.

Distinction between general alliance and treaties of limited succor and subsidy. § 279. General alliances are to be distinguished from treaties of limited succor and subsidy. Where one State stipulates to furnish to another a limited succor of troops, ships of war, money, or provisions, without any promise looking to an eventual engagement in general hostilities, such a treaty does not necessarily render the party furnishing this limited succor, the enemy of the opposite belligerent. It only becomes such, so far as respects the auxiliary forces thus supplied; in all other respects it remains neutral. Such, for example, have long been the accustomed relations of the confederated Cantons of Switzerland with the other European powers.^(a)¹⁴⁵

Casus fœderis of a defensive alliance. § 280. Grotius, and the other text-writers, hold that the *casus fœderis* of a defensive alliance does not apply to the case of a war manifestly unjust, that is, to a war of aggression on the part of the power claiming the benefit of the alliance. And it is even said to be a tacit condition annexed to every treaty made in time of peace, stipulating to afford succors in time of war, that the stipulation is applicable only to a just war. To promise assistance in an unjust war would be an obligation to commit injustice, and no such contract is valid. But, it is added, this tacit restriction in the terms of a general alliance can be applied only to a manifest case of unjust aggression on the part of the other contracting party, and cannot be used as a pretext to elude the performance of a positive and unequivocal engagement, without justly exposing the ally to the imputation of bad faith. [357] In doubtful cases, the presumption ought rather to be in favor of our confederate, and of the justice of his quarrel.^(a)¹⁴⁶

The application of these general principles must depend upon the

(a) Vattel, *Droit des Gens*, liv. iii. ch. 6, §§ 79–82.

¹⁴⁵ In the present state of national relations, it is difficult to conceive of a government maintaining alliance with a nation to whose enemies it is furnishing military assistance, although limited, and in pursuance of a treaty obligation contracted prior to, and independently of, that war. A nation would be justified in treating any such government as an enemy generally in the war. The Swiss Confederation took the ground, in 1859, that the Swiss troops in foreign service were not contingents furnished by the Confederation, as a national act, but only voluntary organizations of Swiss citizens, having no more than a permission from the Swiss Government to enter into foreign service. This permission has since been withdrawn; and Swiss citizens cannot now enter foreign service without special permission of the Council of the Helvetic Union. *Annuaire des deux Mondes*, 1858–9, pp. 162, 299. *Almanach de Gotha*, 1861, p. 8.]—D.

(a) Grotius, *de Jur. Bel. ac Pac.* lib. ii. cap. 15, § 13; cap. 25, § 4. Bynkershoek, *Quæst. Jur. Pub.* lib. i. cap. 9. Vattel, *Droit des Gens*, liv. ii. ch. 12, § 168; liv. iii. ch. 6, §§ 86–96.

¹⁴⁶ See note No. 147, *infra*, Treaty Obligations to Aid in Defensive Wars.]—D.

nature and terms of the particular guaranties contained in the treaty in question. This will best be illustrated by specific examples.

§ 281. Thus, the States-General of Holland were engaged, previously to the war of 1756, between France and Great Britain, in three different guaranties and defensive treaties with the latter power. The first was the original defensive alliance, forming the basis of all the subsequent compacts between the two countries, concluded at Westminster in 1678. In the preamble to this treaty, the preservation of each other's dominions was stated as the cause of making it; and it stipulated a mutual guaranty of all they already enjoyed, or might thereafter acquire by treaties of peace, 'in Europe only.' They further guarantied all treaties which were at that time made, or might thereafter conjointly be made, with any other power. They stipulated also to defend and preserve each other in the possession of all towns and fortresses which did at that time belong, or should in future belong, to either of them; and that for this purpose when either nation was attacked or molested, the other should immediately succor it with a certain number of troops and ships, and should be obliged to break with the aggressor in two months after the party that was already at war should require it; and that they should then act conjointly, with all their forces, to bring the common enemy to a reasonable accommodation.

Alliance between Great Britain and Holland.

The second defensive alliance then subsisting between Great Britain and Holland was that stipulated by the treaties of barrier and succession, of 1709 and 1713, by which the Dutch barrier on the side of Flanders was guarantied on the one part, and the Protestant succession to the British crown, on the other; and it was mutually stipulated, that, in case either party should be attacked, the other should furnish, at the requisition of the injured party, certain specified succors; and if the danger should be such as to require a greater force, the other ally should be obliged to [358] augment his succors, and ultimately to act with all his power in open war against the aggressor.

The third and last defensive alliance between the same powers, was the treaty concluded at the Hague in 1717, to which France was also a party. The object of this treaty was declared to be the preservation of each other reciprocally, and the possession of their dominions, as established by the treaty of Utrecht. The contracting parties stipulated to defend all and each of the articles of the said treaty, as far as they relate to the contracting parties respectively, or each of them in particular; and they guarantee all the kingdoms, provinces, states, rights, and advantages, which each of the parties at the signing of that treaty possessed, confining this guaranty to Europe only. The succors stipulated by this treaty were similar to those above mentioned; first, interposition of good offices, then a certain number of forces, and lastly,

declaration of war. This treaty was renewed by the quadruple alliance of 1718, and by the treaty of Aix-la-Chapelle, 1748.

Controversy between Great Britain and the States-General. § 282. It was alleged on the part of the British court, that the States-General had refused to comply with the terms of these treaties, although Minorca, a possession *in Europe* which had been secured to Great Britain by the treaty of Utrecht, was attacked by France.

Two answers were given by the Dutch government to the demand of the stipulated succors:—

1. That Great Britain was the aggressor in the war; and that, unless she had been first attacked by France, the *casus fœderis* did not arise.

2. That admitting that France was the aggressor in Europe, yet it was only in consequence of the hostilities previously commenced in America, which were expressly excepted from the terms of the guaranties.

Lord Liverpool's reply. § 283. To the first of these objections it was irresistibly replied by the elder Lord Liverpool, that although the treaties which contained these guaranties were called defensive treaties only, yet the words of them, and particularly that of 1678, which was the basis of all the rest, by no means expressed the point clearly in the sense of the objection, since they guarantied 'all the rights and possessions' of both parties, against 'all kings, princes, republics, and states;' so that if [359] either should 'be attacked or molested by hostile act, or open war, or in any other manner disturbed⁽¹⁾ in the possession of his states,⁽¹¹⁾ territories, rights, immunities, and freedom of commerce,' it was then declared what should be done in defence of these objects of the guaranty, by the ally who was not at war, but it was nowhere mentioned as necessary that the attack of these should be the first injury or attack. 'Nor,' continues Lord Liverpool, 'doth this loose manner of expression appear to have been an omission or inaccuracy. They who framed these guaranties certainly chose to leave this question, without any further⁽¹¹¹⁾ explanation, to that good faith which must ultimately decide upon all contracts between^(1v) sovereign States. It is not presumed that^(v) they hereby meant, that either party should be obliged to support every act of violence or injustice which his ally might be prompted to commit through views of interest or ambition; but, on the other hand, they were cautious of affording too frequent opportunities to pretend that the case of the guaranties did not exist, and of eluding thereby the principal intention of the alliance; both these inconveniences were equally to be avoided; and they wisely

[¹ For manner disturbed read manner whatsoever disturbed.]—G.G.W.

[¹¹ For states read estates.]—G.G.W.

[¹¹¹ For further read farther.]—G.G.W.

[^{1v} For upon all contracts between read upon the execution of all contracts made between.]—G.G.W.

[^v Omit that.]—G.G.W.

thought fit to guard against the latter, no⁽ⁱ⁾ less than the former. They knew that in every war between civilized nations, each party endeavors⁽ⁱⁱ⁾ to throw upon the other the odium and guilt of the first act of provocation and aggression; and that the worst of causes was never without its excuse. They foresaw that this alone would unavoidably give sufficient occasion to endless cavils and disputes, whenever the infidelity of an ally inclined him to avail himself of them. To have confined, therefore, the case of the guaranty by a more minute description of it, and under closer restrictions of form, would have subjected to still greater uncertainty a point which, from the nature of the thing itself, was already too liable to doubt:—they were sensible that the cases would be infinitely various; that the motives to self-defence, though just,⁽ⁱⁱⁱ⁾ might not always be apparent;^(iv) that an artful enemy might disguise the most alarming preparations; and that an injured nation might be necessitated to commit even a preventive hostility, before the danger which caused it could be publicly known. Upon such considerations, these negotiators wisely thought proper to give the greatest latitude to this question, and to leave it open to a fair and liberal construction, such as might be expected from friends, [360] whose interests these treaties were supposed to have for ever united.^(a)^(v)

His lordship's answer to the next objection, that the hostilities commenced by France in Europe were only in consequence of hostilities previously commenced in America, seems equally satisfactory, and will serve to illustrate the good faith by which these contracts ought to be interpreted. 'If the reasoning on which this objection is founded was admitted, it would alone be sufficient to destroy the effects of every guaranty, and to extinguish that confidence which nations mutually place in each other, on the faith of defensive alliances; it points out to the enemy a certain method of avoiding the inconvenience of such an alliance; it shows him where he ought to begin his attack. Let only the first effort be made upon some place not included in the guaranty, and, after that, he may pursue his views against its very object,^(vi) without any apprehension^(vii) of the consequence. Let France first attack some little spot belonging to Holland, in America, and her barrier would be no longer guaranteed. To argue in this manner is to^(ix) trifle

(a) Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations. By Charles, Earl of Liverpool. 1st edit. 1757.^(v)

[ⁱ For latter, no *read* latter of these, no.]—G.G.W.

[ⁱⁱ For party endeavors *read* party always endeavors.]—G.G.W.

[ⁱⁱⁱ For though just *read* though evidently just.]—G.G.W.

[^{iv} For be apparent *read* be universally apparent.]—G.G.W.

[^v For 1757 *read* 1758. The edition of 1801 on its title page states: 'written in 1758' and in the Preface states: 'Three-and-forty years have now elapsed, since I first composed that treatise'.]—G.G.W.

[^{vi} This quotation does not occur in the edition of 1758, but the edition of 1759, often reprinted, is as corrected.]—G.G.W. [^{vii} For its very object *read* the very object of it.]—G.G.W.

[^{viii} For apprehension *read* apprehensions.]—G.G.W.

[^{ix} For manner is to *read* manner would be to.]—G.G.W.

with the most solemn engagements. The proper object of guaranties is the preservation of some particular country to some⁽ⁱ⁾ particular power. The treaties above mentioned promise the defence of the dominions of each party in Europe, simply and absolutely, whenever they are *attacked* or *molested*. If, in the present war, the first attack was made out of Europe, it is manifest that long ago an attack hath been⁽ⁱⁱ⁾ made in Europe; and that is, beyond a doubt, the case of these guaranties.

‘Let us try, however, if we cannot discover what hath once been the opinion of Holland upon⁽ⁱⁱⁱ⁾ a point of this nature. It hath already been observed that the defensive alliance between England and Holland, of 1678, is but a copy of the first twelve^(iv) articles of the French treaty of 1662. Soon after Holland had concluded this last alliance with France, she became engaged in a war with England. The attack then began,^(v) as in the present case, out of Europe, on the coast of Guinea; and the cause of the war was also the same,—a disputed right to certain possessions out of the bounds of Europe, some in Africa, and others in the East Indies. Hostilities having continued for some time in those parts, they [361] afterwards commenced also in Europe. Immediately upon this, Holland declared that the case of that guaranty did exist, and demanded the succors which were stipulated. I need not produce the memorials of their ministers to prove this; history sufficiently informs us that France acknowledged the claim, granted the succors, and entered even into open war in the defence of her ally. Here, then, we have the sentiments of Holland on the same article, in a case minutely parallel. The conduct of France^(vi) also pleads in favor of the same opinion, though her concession, in this respect, checked at that time her youthful monarch in the first essay of his ambition, delayed for some^(vii) months his entrance into the Spanish provinces, and brought on him the enmity of England.’(b)

Alliance
between
Great Brit-
ain and
Portugal.

§ 284. The nature and extent of the obligations contracted by treaties of defensive alliance and guaranty, will be further illustrated by the case of the treaties subsisting between Great Britain and Portugal, which has been before alluded to for another purpose.(a) The treaty of alliance, originally concluded between these powers in 1642, immediately after the revolt of the Portuguese nation against Spain, and the establishment of the House of Braganza on the throne, was renewed, in 1654, by the Protector, Cromwell, and again confirmed by the treaty of 1661, between Charles II. and Alfonso VI., for the

(b) Lord Liverpool’s Discourse, 86.(viii)

(a) *Vide ante*, § 68.

[ⁱ For country to some read country in possession of some.]—G.G.W.

[ⁱⁱ For hath been read hath also been.]—G.G.W.

[ⁱⁱⁱ For upon read on.]—G.G.W.

[^{iv} For first twelve read twelve first.]—G.G.W.

[^v For then began read then first began.]—G.G.W.

[^{vi} The words The conduct of France are omitted in some editions.]—G.G.W.

[^{vii} For some read several.]—G.G.W.

[^{viii} In the edition of 1759, p. 68.]—G.G.W.

marriage of the former prince with Catharine of Braganza. This last-mentioned treaty fixes the aid to be given, and declares that Great Britain will succor Portugal 'on all occasions, when that country is attacked.' By a secret article, Charles II., in consideration of the cession of Tangier and Bombay, binds himself 'to defend the colonies and conquests of Portugal against all enemies, present or future.' In 1703, another treaty of defensive and perpetual alliance was concluded at Lisbon, between Great Britain and the States-General on the one side, and the King of Portugal on the other; the guaranties contained in which were again confirmed by the treaties of peace at Utrecht, between Portugal and France, in 1713, and between Portugal and Spain, in 1715. On the emigration of the Portuguese royal family to Brazil, in 1807, a convention was concluded between Great Britain and Portugal, by which the latter kingdom is guarantied to the lawful heir of the [362] House of Braganza, and the British government promises never to recognize any other ruler. By the more recent treaty between the two powers, concluded at Rio Janeiro, in 1810, it was declared, 'that the two powers have agreed on an alliance for defence, and reciprocal guaranty against every hostile attack, conformably to the treaties already subsisting between them, the stipulations of which shall remain in full force, and are renewed by the present treaty in their fullest and most extensive interpretation.' This treaty confirms the stipulation of Great Britain to acknowledge no other sovereign of Portugal but the heir of the House of Braganza. The treaty of Vienna, of the 22d January, 1815, between Great Britain and Portugal, contains the following article:—"The treaty of alliance at Rio Janeiro, of the 19th February, 1810, being founded on temporary circumstances, which have happily ceased to exist, the said treaty is hereby declared to be of no effect; without prejudice, however, to the ancient treaties of alliance, friendship, and guaranty, which have so long and so happily subsisted between the two crowns, and which are hereby renewed by the high contracting parties, and acknowledged to be of full force and effect."

§ 285. Such was the nature of the compacts of alliance and guaranty subsisting between Great Britain and Portugal, at the time when the interference of Spain in the affairs of the latter kingdom compelled the British government to interfere, for the protection of the Portuguese nation against the hostile designs of the Spanish court. In addition to the grounds stated in the British Parliament, to justify this counteracting interference, it was urged, in a very able article on the affairs of Portugal, contemporaneously published in the 'Edinburgh Review,' that although, in general, an alliance for defence and guaranty does not impose any obligation, nor, indeed, give any warrant to interfere in intestine divisions, the peculiar circumstances of the case did constitute the *casus fœderis* contemplated by the treaties in question.

The *casus fœderis* under those treaties.

A defensive alliance is a contract between several States, by which they agree to aid each other in their defensive (or, in other words, in their just) wars against other States. Morally speaking, no other species of alliance is just, because no other species of war can be just. The simplest case of defensive war is, where our ally is openly invaded with military force, by a power to whom she has given no just cause of war. If France or [363] Spain, for instance, had marched an army into Portugal to subvert its constitutional government, the duty of England would have been too evident to render a statement of it necessary. But this was not the only case to which the treaties were applicable. If troops were assembled and preparations made, with the manifest purpose of aggression against an ally; if his subjects were instigated to revolt, and his soldiers to mutiny; if insurgents on his territory were supplied with money, with arms, and military stores; if, at the same time, his authority were treated as an usurpation, and all participation in the protection granted to other foreigners refused to the well-affected part of his subjects, while those who proclaimed their hostility to his person were received as the most favored strangers; in such a combination of circumstances, it could not be doubted that the case foreseen by defensive alliances would arise, and that he would be entitled to claim that succor, either general or specific, for which his alliances had stipulated. The wrong would be as complete, and the danger might be as great, as if his territory were invaded by a foreign force. The mode chosen by his enemy might even be more effectual, and more certainly destructive, than open war. Whether the attack made on him be open or secret, if it be equally unjust, and expose him to the same peril, he is equally authorized to call for aid. All contracts, under the law of nations, are interpreted as extending to every case manifestly and certainly parallel to those cases for which they provide by express words. In that law, which has no tribunal but the conscience of mankind, there is no distinction between the evasion and the violation of a contract. It requires aid against disguised as much as against avowed injustice; and it does not fall into so gross an absurdity as to make the obligation to succor less where the danger is greater. The only rule for the interpretation of defensive alliances seems to be, that every wrong which gives to one ally a just cause of war entitles him to succor from the other ally. The right to aid is a secondary right, incident to that of repelling injustice by force. Wherever he may morally employ his own strength for that purpose, he may, with reason, demand the auxiliary strength of his ally. (a) Fraud [364] neither gives nor takes away any

(a) Vattel's reasoning is still more conclusive in a case of guaranty: 'Si l'alliance défensive porte une garantie⁽¹⁾ de toutes les terres que l'allié possède⁽²⁾ actuellement, le *casus fœderis* se déploie toutes les fois⁽³⁾ que ces terres sont envahies ou menacées d'invasion.' Liv. iii. ch. 6, § 91.

[¹ For *guarantie* read *garentie*.]—G.G.W.
[³ For *toutes les fois* read *dès*.]—G.G.W.

[² For *possède* read *posséde*.]—G.G.W.

right. Had France, in the year 1715, assembled squadrons in her harbors and troops on her coasts; had she prompted and distributed writings against the legitimate government of George I.; had she received with open arms battalions of deserters from his troops, and furnished the army of the Earl of Mar with pay and arms when he proclaimed the Pretender,—Great Britain, after demand and refusal of reparation, would have had a perfect right to declare war against France, and, consequently, as complete a title to the succor which the States-General were bound to furnish, by their treaties of alliance and guaranty of the succession of the House of Hanover, as if the pretended king, James III., at the head of the French army, were marching on London. The war would be equally defensive on the part of England, and the obligation equally incumbent on Holland. It would show a more than ordinary defect of understanding, to confound a war defensive in its *principles* with a war defensive in its *operations*. Where attack is the best mode of providing for the defence of a State, the war is defensive in principle, though the operations are offensive. Where the war is unnecessary to safety, its *offensive* character is not altered because the wrong-doer is reduced to defensive warfare. So a State against which dangerous wrong is manifestly meditated, may prevent it by striking the first blow, without thereby waging a war in its principle offensive. Accordingly, it is not every attack made on a State that will entitle it to aid under a defensive alliance; for if that State had given just cause of war to the invader, the war would not be, on its part, defensive in principle.^(b)¹⁴⁷

(b) 'Dans une alliance défensive le *casus fœderis* n'existe pas tout de suite dès que notre allié est attaqué. Il faut voir encore s'il n'a point donné à son ennemi un juste sujet de lui faire la guerre.⁽¹⁾ S'il est dans le tort, il faut l'engager à donner⁽¹¹⁾ une satisfaction raisonnable.' Vattel, liv. iii. ch. 6, § 90.

[¹⁴⁷ *Treaty Obligations to aid in Defensive Wars*.—This reasoning makes the words 'defensive war' substantially synonymous with justifiable war, or necessary war. As the parties to the treaty for aid in 'defensive war' have declined to agree generally to aid each other in all wars, and have declined to make the justice or necessity of the war the test of their obligation to aid, it is certainly a fair argument that they intended to confine themselves to cases of *defensive operations*, where the territory of the ally is invaded or threatened with invasion, and so long as that danger exists, and to the extent that it exists. This furnishes a more convenient, practical and satisfactory test than that of the justice or necessity of the war; and the latter test the parties declined to establish, when the terms appropriate for the purpose were obvious. It is not unusual, in national federations and compacts, to make provisions for cases of invasion, which are not applicable to any other state of a war. The opinion of Kent [365] (Comm. i. 50-52) seems to be, that a treaty obligation to aid in a defensive war cannot, as of right, be insisted upon, if the ally first actually declares and commences the war, whatever may have been the balance of right and wrong in the previous relations of the belligerent nations. The nation undertaking the obligation so worded is not bound to look beyond the fact that the war is commenced by its own ally. At the same time, Kent holds, that, even if the war be strictly defensive in its form, the guarantor is not bound to render aid, if justice is, in his opinion, clearly against his ally. (Ib. 51.) Woolsey seems also of opinion, that the defensive

[¹ *After guerre. a sentence is omitted.*]—G.G.W.

[¹¹ *For donner read offrir.*]—G.G.W.

Hostages
for the exe-
cution of
treaties.

[365] § 286. The execution of a treaty is sometimes secured by *hostages* given by one party to the other. The most recent and remarkable example of this practice occurred at the peace of Aix-la-Chapelle, in 1748; where the restitution of Cape Breton, in North America, by Great Britain to France, was secured by several British peers sent as hostages to Paris.(a)

Interpre-
tation of
treaties.

§ 287. Public treaties are to be interpreted like other laws and contracts. Such is the inevitable imperfection and ambiguity of all human language, that the mere words alone of any writing, literally expounded, will go a very little way towards explaining its meaning. Certain technical rules of interpretation have, therefore, been adopted by writers on ethics and public law, to explain the meaning of international compacts, in cases of doubt. These rules are fully expounded by Grotius and his commentators; and the reader is referred especially to the [366] principles laid down by Vattel and Rutherford, as containing the most complete view of this important subject.(a)¹⁴⁸

Mediation.

§ 288. Negotiations are sometimes conducted under the mediation of a third power, spontaneously tendering its good offices for this purpose, or upon the request of one or both of the litigating powers, or in virtue of a previous stipulation for that purpose. If the mediation is spontaneously offered, it may be refused by either party; but if it is the result of a previous agreement between the two parties, it cannot be refused without a breach of good faith. When accepted by both parties, it becomes the right and the duty of the mediating power to interpose its advice, with a view to the adjustment of their differences. It thus becomes a party to the negotiation, but has no authority to con-

war referred to in such treaties is to be determined by its moral character, as a warding-off of injustice, and not at all by its military character; and that the aid is due, if the war begins in offensive operations by the ally, provided they be necessary to anticipate injustice; and is not due, although the ally be invaded, if his cause is bad. (Intro. § 103.) But if the treaty is, in terms, to aid in all defensive wars, and the war is strictly a defensive war against an invasion, how can the ally refuse assistance, and still consider the treaty as binding? The true position in such a case is, that, while the treaty does require the stipulated aid, the misconduct of the nation which brought the invasion upon itself may be so gross as to absolve the other party from his obligation. In other words, if a nation chooses to make a clear agreement to lend aid in a defensive war, and the true construction of that term refers to the military character of the war, and not to its moral aspects solely, then the question of the causes of the defensive war is addressed, not to the construction of the treaty obligation, but to an excuse in ethics for not fulfilling the obligation.

For the arguments on the obligation upon the United States of the French treaty of 1778, see Tucker's *Life of Jefferson*, i. 414, 421, and Hamilton's *Works*, iv. 366, 382. As to defensive wars, in their military as distinguished from their moral character, see Halleck's *Intern. Law*, 329; Klüber, *Droit des Gens*, § 236; Phillimore's *Intern. Law*, iii. § 67; Kent's *Comm.* i. 50, note; Ortolan, *Règles Intern.* ii. 5; Rayneval, *Droit Nat. liv.* iii. ch. 2; Bello, *Derecho Intern.* Part II. ch. 1, § 3.]—D.

(a) Vattel, *liv.* ii. ch. 16, §§ 245–261.

(a) Grotius, *de Jur. Bel. ac Pac. lib.* ii. cap. 16. Vattel, *liv.* ii. ch. 17. Rutherford's *Inst.* b. ii. ch. 7.

[¹⁴⁸ Wildman's *Intern. Law*, 176–185. Woolsey's *Intro.* §§ 109, 150.]—D.

strain either party to adopt its opinion. Nor is it obliged to guaranty the performance of the treaty concluded under its mediation, though, in point of fact, it frequently does so. (a)¹⁴⁹

§ 289. The art of negotiation seems, from its very nature, hardly capable of being reduced to a systematic science. It depends essentially on personal character and qualities, united with a knowledge of the world and experience in business. These talents may be strengthened by the study of history, and especially the history of diplomatic negotiations; but the want of them can hardly be supplied by any knowledge derived merely from books. One of the earliest works of this kind is that commonly called *Le Parfait Ambassadeur*, originally published in Spanish by Don Antonio de Vera, long time ambassador of Spain at Venice, who died in 1658. It was subsequently published by the author in Latin, and different translations appeared in Italian and French. Wicquefort's book, published in 1679, under the title of *L'Ambassadeur et ses Fonctions*, although its principal object is to treat of the rights of legation, contains much valuable information upon the art of negotiation. Callières, one of the French plenipotentiaries at the treaty of Ryswick, published, in 1716, a work entitled *De la manière de négocier avec les Souverains*, [367] which obtained considerable reputation. The Abbé Mably also attempted to treat this subject systematically, in an essay entitled *Principes des Négociations*, which is commonly prefixed as an introduction to his *Droit Publique de l'Europe*, in the various editions of the works of that author. A catalogue of the different histories which have appeared of particular negotiations would be almost interminable; but nearly all that is valuable in them will be found collected in the excellent work of M. Flassan, entitled *L'Histoire de la Diplomatie Française*. The late Count de Ségur's compilation from the papers of Favier, one of the principal secret agents employed in the double diplomacy of Louis XV., entitled *Politique de tous les Cabinets de l'Europe pendant les Règnes de Louis XV. et de Louis XVI.*, with the notes of the able and experienced editor, is a work which also throws great light upon the history of French diplomacy. A history of treaties, from the earliest times to the Emperor Charlemagne, collected from the ancient Latin and Greek authors, and from other monuments of antiquity, was published by Barbeyrac, in 1739. (a) It had been preceded by the immense collection of Dumont, embracing all the public treaties of Europe, from the age of Charlemagne to the commencement

Diplomat
history.

(a) Klüber, *Droit des Gens Moderne de l'Europe*, Part. II. tit. 2, § 1; ⁽¹⁾ ch. 2, § 160.

^[149] See note 40, *ante*, on Mediation. Also, *North American Review*, April, 1866, article on *International Arbitrations*.—D.

(a) *Histoire des Anciens Traités*, par Barbeyrac, forming the first volume of Dumont's *Supplément au Corps Diplomatique*.

of the eighteenth century.(b) The best collections of the more modern European treaties are those published at different periods by Professor Martens, of Göttingen, including the most important public acts upon which the present conventional law of Europe is founded. To these may be added Koch's *Histoire abrégée des Traités de Paix depuis la Paix de Westphalie*, continued by Schöll. A complete collection of the proceedings of the Congress of Vienna has also been published in German, by Klüber.(c)¹⁵⁰

(b) *Corps Universel Diplomatique du Droit des Gens*, &c. 8 tomes, fol. Amsterd. 1726–1731. *Supplément au Corps Universel Diplomatique*. 5 tomes, fol. 1739.

(c) *Acten des Wiener Congresses in den Jahren 1814 und 1815*; von J. L. Klüber. Erlangen, 1815 und 1816. 6 Bde. 8vo.

[¹⁵⁰ Appendix II. to Woolsey's Introduction contains a list of the most important treaties since the Reformation, with a brief statement of their provisions. See also Phillimore's *Intern. Law*, iii. 650, Index, title 'Treaties.']—D.

[368] PART FOURTH

INTERNATIONAL RIGHTS OF STATES IN THEIR HOSTILE RELATIONS

CHAPTER I

COMMENCEMENT OF WAR, AND ITS IMMEDIATE EFFECTS

§ 290. THE independent societies of men, called States, acknowledge no common arbiter or judge, except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every State has therefore a right to resort to force, as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each State is also entitled to judge for itself, what are the nature and extent of the injuries which will justify such a means of redress.

Redress
by forcible
means be-
tween na-
tions.

Among the various modes of terminating the differences between nations, by forcible means short of actual war, are the following:—

1. By laying an embargo or sequestration on the ships and goods, or other property of the offending nation, found within the territory of the injured State.

2. By taking forcible possession of the thing in controversy, by securing to yourself by force, and refusing to the other nation, the enjoyment of the right drawn in question.

3. By exercising the right of vindictive retaliation, (*retorsio facti*), or of amicable retaliation, (*retorsion de droit*); by which [369] last, the one nation applies, in its transactions with the other, the same rule of conduct by which that other is governed under similar circumstances.

4. By making reprisals upon the persons and things belonging to the offending nation, until a satisfactory reparation is made for the alleged injury.(a)

§ 291. This last seems to extend to every species of forcible means for procuring redress, short of actual war, and, of course, to include all the others above enumerated. Reprisals are *negative*, when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another nation to enjoy a right which it claims. They are *positive*, when they consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction.(a)

Reprisals.

Reprisals are also either *general* or *special*. They are *general*, when

(a) Vattel, liv. ii. ch. 18. Klüber, Droit des Gens Moderne de l'Europe, § 234.

(a) Klüber, § 234, note c.

a State which has received, or supposes it has received, an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found. It is, according to present usage, the first step which is usually taken at the commencement of a public war, and may be considered as amounting to a declaration of hostilities, unless satisfaction is made by the offending State. *Special* reprisals are, where letters of marque are granted, in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation.^(b)

Reprisals are to be granted only in case of a clear and open denial of justice. The right of granting them is vested in the sovereign or supreme power of the State, and, in former times, was regulated by treaties and by the municipal ordinances of different nations. Thus, in England, the statute of 4 Hen. V., cap. 7, declares,⁽¹⁾ 'That if any subjects of the realm are oppressed in time of peace by any foreigners,⁽¹¹⁾ the king will grant marque in due form to all that feel themselves grieved;⁽¹¹¹⁾' which form is specially pointed out, and directed to be observed in the statute. So also, in France, the celebrated marine ordinance of Louis XIV., of 1681, prescribed the forms to be observed for obtaining special letters of [370] marque by French subjects against those of other nations; but these special reprisals in time of peace have almost entirely fallen into disuse.^(c)

Effect of
reprisals.

§ 292. Any of these acts of reprisal, or resort to forcible means of redress between nations, may assume the character of war in case adequate satisfaction is refused by the offending State. 'Reprisals,' says Vattel, 'are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to its own advantage, till it obtains payment of what is due, together with interest and damages; or keep it as a pledge till the offending nation has refused ample satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears they are confiscated, and then reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that

(b) Bynkershoek, Quæst. Jur. Pub. lib. i. Duponceau's Transl. p. 182, note.

(c) Vattel, Droit des Gens, liv. ii. ch. 18, §§ 342-346. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 24. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. viii. ch. 2, § 260. Martens, Essai concernant les Armateurs, § 4.

[¹ Omit quotation mark before That.]—G.G.W.

[¹¹ Insert quotation mark before the.]—G.G.W.

[¹¹¹ For all that feel themselves grieved read all them that feel themselves in this case oppressed.]—G.G.W.

war is declared, or hostilities commenced; and then, also, the effects seized may be confiscated.^[1](a)¹⁵¹

(a) Vattel, Droit des Gens, liv. ii. ch. 18, § 342.

[¹⁵¹ *Reprisals*.—Reprisals may be granted for injuries to private citizens as well as to the State, and when done by foreign individuals as well as when by public authority. The granting of letters of reprisal (not of marque and reprisal) to citizens injured by private hands, to remunerate themselves by reprisals on private property of any citizens of the nation of the wrong-doer, has been reprobated by the best modern writers, and discountenanced by the practice of nations. It entails all the responsibilities of national acts, with none of their political or moral securities. (Stephens's Blackstone, ii. 516. Phillimore, iii. 22. Woolsey, § 114. Halleck, 298, § 12.) Especially is it true, that, for injuries done directly to the State, letters of general reprisal are not now issued to private persons in time of peace. The issuing of such letters would now be considered an act of war. (Kent, i. 61. Halleck, 299.) Phillimore, iii. 24-36, contains a summary of the chief modern instances of general reprisals.

The right of making reprisals is not limited to property, but extends to persons. Still, the practice of modern times discountenances the arrest and detention of innocent persons, strictly in the way of reprisal. (Halleck, 301, § 16. Phillimore, iii. 23.)

By the later usage of speech, the term 'letter of marque' seems to be confined to the authorization to private armed trading vessels to make captures of property of the enemy in war. If there is no declared or recognized *status* of war, and the government, [371] for a public purpose, desires to seize property, in the way of security or warning or specific retaliation, such authorization to such vessels would be called 'letters of reprisals,' or 'letters of marque and reprisal.' If, in time of war, the private vessel receiving the authorization is fitted out and employed solely as a cruiser, she is called a 'privateer.'

It is agreed that reprisals for private wrongs should never be resorted to by a government until all reasonable appeals to the government of the wrong-doer have been exhausted. The course of the British Government in the case of *Pacifico*, in making reprisals against Greece, has been condemned, not only because the preliminary methods had not been exhausted, but because of the extortionate character of the demand made against a power incapable of resistance. (Phillimore, iii. 29-33. Halleck, 298, § 11.)

The case of *McLeod*, sometimes discussed in this connection, was in no sense a case of reprisal. In time of peace, *McLeod*, being in New York, was arrested and tried before the regular judicial tribunals, in the usual course of criminal procedure, on a charge of murder and arson committed by him within the territory of New York. The case took an international character only from the fact, that, after his arrest, the British Government assumed the responsibility for his act, in an address to the United States Government. The question of law involved was, whether, as peace existed between the United States and Great Britain at the time of the act done, and down to the time of the trial, and the responsibility for his act was not assumed by the British Government at the time of its commission nor until the trial, and he was not a commissioned officer of the government, and the act was done within the limits of New York, the courts of New York were ousted of their jurisdiction by such an assuming of responsibility. The Supreme Court of New York held that it did not lose its jurisdiction thereby. As the verdict of the jury was of acquittal, the question did not get before the Supreme Court of the United States. Mr. Webster, then Secretary of State, admitted, in his correspondence with Mr. Fox, the British Minister, that the intervention of the British Government did require our government to protect *McLeod* against judicial proceedings; and the adjustment of the diplomatic controversy was upon that principle, which has also received the sanction of the best writers. (Halleck, 303, § 19-23. Webster's Diplomatic Papers, 120-140. Webster's Works, vi. 247-270. *People v. McLeod*, Wendell, xxv. 483. Appendix to Wendell's Rep. xxvi. 663. Annual Register, 1841, viii.⁽¹⁾ 310. Phillimore, iii. 50-54.)

The remedy of *retorsion*, where there is no recognized war, is distinguished from strict reprisals. It is the application of the *lex talionis* to nations, and is confined to cases of the violation of mere comity, or of the imperfect obligations. It is not proper to resort to specific retaliation for cases of serious injury and injustice. The tendency of modern times is to put every thing which may result in public international controversy directly into the hands of the government, and to confine all acts of force to public military officers, and to simplify

[¹ Insert quotation mark *after* confiscated.]—G.G.W.

[¹¹ For viii. read xiii.]—G.G.W.

Embargo
previous to
declaration
of hostilities.

[371] § 293. Thus, where an embargo was laid on Dutch property in the ports of Great Britain, on the rupture of the peace of Amiens, in 1803, under such circumstances as were considered by the British government as consti[372]tuting a hostile aggression on the part of Holland, Sir W. Scott, (Lord Stowell,) in delivering his judgment in this case, said, that 'the seizure was at first equivocal;^[1] and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. Such^[11] would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction^[111] end in hostility, the retroactive effect is exactly^[iv] the other way. It impresses the direct hostile character upon the original seizure: it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus* by which it is^[v] done, that it was done *hostili animo*; and it^[vi] is to be considered as a hostile measure, *ab initio*, against persons guilty of injuries which they refuse to^[vii] redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restoration^[viii] of such property, taken before a formal declaration of hostilities.'^(a)¹⁵²

these acts of force into acts of war, either special and preliminary, or general. (Woolsey, § 114. Halleck, 296, § 10. Kent, i. 93, 94. Manning, 105. Klüber, § 234. Heffter, §§ 110, 111. Phillimore, iii. 8.)

By treaties and the practice of nations, the making of reprisals is now confined to the seizure of commercial property on the high seas, by public cruisers, or private cruisers specially authorized thereto. Heffter, § 110.]—D.

(a) Robinson's Adm. Rep. v. 246, The Boedes Lust.

[¹⁵² Embargo.—The embargo of which the author treats is the hostile embargo. The term (derived from *embargar*, to hinder or detain) is also applicable to a civil act of a government detaining the ships of its own people in port, which amounts, in practice, to an interdiction of commerce; for it would usually be accompanied with a closing of its ports to foreign vessels. If the motive for this interdiction is simply municipal, and not in the way of reprisals or hostility to foreign powers, it has claims to be acquiesced in by them. The principal instance was that of the embargo by the United States in 1807. This was declared to be a measure of precaution to protect American vessels from threatened dangers from the great maritime belligerents of Europe, and, as such, acquiesced in by the European powers. As freedom of commerce is a cardinal principle of modern times, and treaties of commerce exist everywhere, the motives for such an interdiction will always be inquired into by foreign nations who are losers by it. And commerce is so necessary to the prosperity of a nation, that it is hardly supposable that any but a nation unable to protect itself otherwise would resort to a general civil embargo.

To return to the hostile embargo. The effect of this, as distinguished from reprisals, is the seizure of all vessels and cargoes of some other nation found in port, to be held to await events. If the result is peace, they are restored. If the result is war, the recognition of war relates back to the seizure, and the property is held to have been taken *jure belli*. It is true,

[¹ For the seizure was at first equivocal *read* This was the state of the first seizure. It was at first equivocal.]—G.G.W.

[¹¹ For Such vessel That.]—G.G.W.

[¹¹¹ For transaction *read* transactions.]—G.G.W.

[^{iv} For exactly *read* directly.]—G.G.W.

[^v For is *read* was.]—G.G.W.

[^{vi} Omit it.]—G.G.W.

[^{vii} For *initio*, against persons guilty of injuries which they refuse to *read* *initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to.]—G.G.W.

[^{viii} For restoration *read* restitution.]—G.G.W.

[373] § 294. The right of making war, as well as of authorizing reprisals, or other acts of vindictive retaliation, belongs, in every civilized nation, to the supreme power of the State. The exercise of this right is regulated by the fundamental laws or municipal constitution in each country, and may be delegated to its inferior authorities in remote possessions, or even to a commercial corporation—such, for example, as the British East India Company—exercising, under the authority of the State, sovereign rights in respect to foreign nations.^(a)

Right of making war, in whom vested.

§ 295. A contest by force between independent sovereign States is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive [374] law of nations makes no distinction, in this respect, between a just and an unjust war. A war in form, or duly commenced, is to be considered, as to its effects, as just on both

Public or solemn war

the government may, on declaration of war, allow the embargoed vessels time to depart, the purpose of their seizure—namely, the preventing of war,—having failed. Still, as that course has never yet been followed, embargo refers itself directly to the question of the right, on breaking out of a war, to seize ships and cargoes found in port. This is treated of hereafter. (See note 156, *infra*, on Enemy's Property found in the Country.)

The motive for the hostile embargo is to coerce the other nation to the doing of some act assumed to be its duty. The happening of a war shows the failure of the process, and leaves the ships in the hands of the government as prizes of war; and [373] the use the government may make of such ships, when so in its possession, is immaterial.

But embargo has been employed for a still different purpose; that is, to gain possession of neutral vessels found in port on the breaking out of a war, to be used for transportation of munitions or troops, or for other temporary belligerent purposes. It is difficult to distinguish this from the seizure of innocent neutral vessels, at any later period of the war, for the use of the belligerent government. This act is called *Angaria*, or *le droit d'Angarie*, or *Prestation*. It is a kind of forced loan or pre-emption, attempted to be justified only by the necessities of war, and always accompanied with compensation. It has had the sanction of usage and of good writers. (Massé, *Droit Comm.* tit. 1, ch. 2, §§ 5, 7.⁽¹⁾ Azuni, tit. 1, ch. 3, art. 5.) Massé even says that indemnity for injuries received, in addition to compensation for use, in nature of damage, is not established by usage. (Tit. 1, ch. 11, sect. 2, § 5, No. 324.⁽¹¹⁾) Phillimore (iii. 42) thinks the practice to be excused, rather than justified, only by an overruling necessity, and that the act should be accompanied by full indemnity. By this he means, we may presume, that it is not a right at all, but an act resorted to from necessity, for which apology and compensation must be made, at the peril of war; in other words, that it is a violation of a right. The treaties between the United States and Prussia of 1785, 1799, and 1828 (U. S. Laws, viii. 92, 170, 384), and with Venezuela in 1830 (U. S. Laws, viii. 470), provide that, in case of war between one of the contracting parties and another nation, the vessels of the other contracting party shall not be liable to be detained and used for any military expedition or other belligerent purpose, otherwise than as those of the most favored nations; and that compensation shall be made. These treaties certainly seem to recognize this *angaria* as a right, or at least as a practice of nations, and only seek to regulate its exercise. Heffter (§ 150) speaks of *angaria* as either entirely prohibited by modern treaties, or as allowed only in case of urgent necessity and upon terms of full indemnity.

The truth seems to be, that the violence of early times, and occasional acts in modern times under urgent necessity, and some recognitions in later treaties, have led commentators to place in the category of rights, in connection with embargo and reprisals, what in fact is only an occasional and not unlikely exercise of power by a belligerent, without right.]—D.

(a) Vattel, liv. iii. ch. 1, § 4. Martens, *Précis*, &c., liv. viii. ch. 2, §§ 260, 264.

[¹ The reference to Massé, *Droit Comm.* ed. 1861 is Tome 1, liv. 2, tit. 1, ch. 2, § 6.]—G.G.W.

[¹¹ Massé, *Droit Comm.* ed. 1861, Tome 1, liv. 2, tit. 1, ch. 2, sect. 2, § 6, No. 330.]—G.G.W.

sides. Whatever is permitted by the laws of war to one of the belligerent parties is equally permitted to the other.(a)

Perfect and
imperfect
wars.

§ 296. A *perfect* war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case and under every circumstance permitted by the general laws of war. An *imperfect* war is limited as to places, persons, and things.(a)

A civil war between the different members of the same society is what Grotius calls a *mixed* war; it is, according to him, *public* on the side of the established government, and *private* on the part of the people resisting its authority. But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations.(b)¹⁵³

(a) Vattel, *Droit des Gens*, liv. iii. ch. 12. Rutherford's *Inst.* b. ii. ch. 9, § 15.

(a) Such were the limited hostilities authorized by the United States against France in 1798. Dallas's *Rep.* ii. 21; iv. 37.

(b) *Vide ante*, §§ 18-26.

¹⁵³ *Belligerent Powers exercised in Civil War.*—This question has received a practical solution in a war on a vast scale,—the great rebellion in the United States, of 1861. This was not an insurrection of professed citizens for a redress of grievances, against a government whose general authority they acknowledged, nor an insurrection or civil war for the purpose of changing the government or dynasty of an acknowledged common country. It was an attempt of a majority of the people in one section of the country to organize themselves into a distinct and independent sovereignty; in other words, an attempt, by an act of revolution, to set up, within the previously acknowledged limits of a previously acknowledged common nationality, and of a government acknowledged to be legitimate, a distinct and independent nationality. As a question of law, the nation could not but regard this as rebellion and treason. It was a political question whether it should be acquiesced in, and the independence of the rebels recognized, or the rebellion be suppressed by force. (See note 32, *ante*, on The United States a Supreme Government.) The rebels organized a government complete in all its parts,—legislative, executive, and judicial,—and set it in operation over the region covered by the greater part of eleven States; and declared that they should regard any attempt to enforce the national authority within their asserted limits as an act of international war: treating the United States as a separate nationality. They began the war by the bombardment of Fort Sumter, which the national forces refused to surrender. The President of the United States called out the militia, and announced his intention of enforcing national authority. The Insurgent Government then declared war to exist, and issued letters of marque for cruisers against American commerce. The President of the United States, on [375] the 17th April, issued a proclamation of blockade of all the ports of the coast in the possession of the rebels.

On the 13th May, the Queen of Great Britain issued a proclamation recognizing the existence of war between the United States and the so-called Confederate States, and the right of each to the exercise of belligerent powers on the ocean, but not recognizing the national independence of the latter, and enjoining neutrality on her own subjects. Similar recognitions of belligerent rights were made by France and the other chief commercial powers of Europe, and by Brazil. The United States began a blockade, which was made effective rapidly from point to point, until it embraced all the ports of the districts of country in rebellion. The United States exercised the right of stopping and searching neutral vessels, in the manner usual in international wars. The vessels captured—whether for attempt to break blockade, for carrying contraband of war, or as enemy's property—were taken into port, and submitted to the adjudication of the prize courts, as prizes of war. Congress passed no laws establishing any new principles or rules respecting condemnation; and the prize courts proceeded entirely upon the rules of international war. The first case which raised distinctly the question of the right of the United States to exercise war powers in suppressing this insurrection, was that of the brig *Amy Warwick*, before the United States Court at Boston. This vessel was captured

[375] § 297. A formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. It was

Declaration of war, how far necessary.

at sea, July 10, 1861, on a passage from Rio Janeiro to Richmond, with a cargo of tobacco.⁽¹⁾ The vessel and cargo belonged to persons permanently residing in Richmond. There was no attempt to break blockade, as the capture was at sea, and the existence of war was not known when the vessel sailed. The only ground for condemnation was 'enemy's property.' An elaborate and thoroughly reasoned opinion was delivered by Judge Sprague, (Sprague's Decisions, ii.; and Law Reporter, xxiv. 335, 494) in which he decided—(1) That it is competent for a nation to exercise the powers of war on the ocean in putting down an insurrection of its own citizens, which has risen to dimensions requiring the exercise of such powers. (2) That, at the time of this capture (July 10, 1861), the political department of the government had decided that the rebellion had reached to that point; and, by calling the militia into actual service, employing the army and navy, and establishing a blockade in pursuance of the law of nations, had treated the state of things as a war *de facto*. (3) That, in case of civil war, among the belligerent powers to be exercised, may be that of condemnation as 'enemy's property,' in the technical sense of the prize law. (4) That one of the proofs of 'enemy's property' is, that it belongs to persons who are at the time permanent residents in a place or region which is under the actual control of the enemy, and of which he has firm possession. (5) In the present case, Richmond, Va., was unquestionably within the lines of the enemy, and under his actual control and *de facto* jurisdiction, civil and military. (6) That the property of a person so residing is to be treated by the prize courts as 'enemy's property,' and the region in which he resides to be styled 'enemy's territory,' without reference to the political or legal relations of the owner or territory to the general government, or the loyalty or disloyalty of the owner: the prize courts looking only to the *predicament of the property*,—to its belonging to a person who is, by his residence, within the actual control and authority of the enemy; it being immaterial whether he be a citizen or an alien, and, if a citizen, whether loyal or disloyal, and to what sovereignty the territory in which he resides, and which the enemy is holding, belongs [376] *de jure* in time of peace. Judge Sprague also decided the further point (not one of international law), that, under the Constitution of the United States, a special antecedent Act of Congress, declaring or recognizing war, is not necessary to enable the President to exercise war powers to put down and repel an insurrectionary force which is itself exercising war powers against the government.

About the same time, the question of the validity of the blockade instituted by the President was raised in New York, in the case of *The Hiawatha*, in which an elaborate opinion was delivered by Judge Betts, sustaining the right of the United States to exercise the right of belligerent blockade, and to condemn neutral vessels violating it, as prizes of war, upon the same rules as in wars between recognized nations.

The causes of the *Amy Warwick* and *Hiawatha*, with a few others, being appealed to the Supreme Court, were argued and decided together there, and reported in Black's Sup. Ct. Reports, ii., under the title of the 'Prize Causes.'⁽¹¹⁾ The Supreme Court was divided in opinion on the constitutional question whether a special Act of Congress was necessary to enable the President to exercise the belligerent powers of blockade and capture as enemy's property, in a case of civil war or insurrection; the majority holding that such an Act of Congress was not necessary. On the main question, the court was unanimous. They considered it settled in the practice of nations, and necessary in the nature of things, that a nation should have the right to meet a rebellion by the exercise of those acts of force commonly known and classified as belligerent rights, or war powers; that among them are included blockade and capture of enemy's property at sea; that, if an insurrection or civil war reaches the dimensions requiring their exercise, neutral nations must acquiesce; and that, in the present case, the country of the owners of *The Hiawatha* (who were British subjects) had recognized these rights by the Queen's proclamation. They held that the establishment of a blockade in pursuance of the law of nations was not inconsistent with the claim of sovereign jurisdiction over the port blockaded, but was only a mode of meeting the actual and *de facto* condition of the port, as one in the possession and control of an organized belligerent power. As to enemy's property, the court held that the exercise of the right of capture and condemnation, as prize of war, of property of a subject residing in the country, was not inconsistent with the claim of sovereign

[¹ For tobacco read coffee.]—G.G.W.

[¹¹ For Causes read Cases.]—G.G.W.

uniformly practised by the ancient [376] Romans, and by the States of modern Europe until about the middle of the seventeenth century.

jurisdiction over him and the territory of his residence. The court said that one of the objects of civil war, as of other wars, was to coerce the enemy by cutting off his resources; that the rules of war placed in that category commercial property found at sea, belonging to any person who was a resident of a place within the actual control and *de facto* jurisdiction of the enemy; that the term 'enemy's territory,' applied to such a place, is a technical term, looking only to the fact at the time, and not to the question of right. 'It has,' said Judge Grier, in delivering the opinion of the court, 'a boundary marked by lines of bayonets, which cannot be crossed but by force.'^[1] It is enemy's territory 'because it is claimed and held in possession by an organized, hostile, belligerent^[1] power.' It was immaterial, the court considered, whether the owner of the property was a citizen or an alien, and whether loyal or disloyal, and what was the *status* of the territory in question and of its inhabitants, as regards the Constitution and laws of the United States and the asserted Constitution and laws of the rebels. The prize courts looked only to the fact that the region was in the possession and control of a power capable of carrying on hostilities against the [377] United States, and of compelling the government to meet them by the exercise of belligerent rights.

The previous cases cited in support of the general doctrine were *Rose v. Himely*, Cranch's Rep. iv. 272; *Cherlot v. Foussat*, Binney's Rep. (Penn.) iii. 253; *Dobrie*^[11] *v. Napier*, Scott, iii. 225; *Santissima Trinidad*, Wheaton's Rep. vii. 306; *United States v. Palmer*, Wheaton's Rep. iii. 635; and the commentators, Wheaton's Intern. Law, 363, 365; Grotius, Prolegom. § 25; Burlamaqui, 263; Rutherford's Inst. ii. 503.

In accordance with this decision, belligerent rights were exercised by the United States cruisers on the ocean, as in case of a foreign war; and all captures were adjudicated on these principles, in the prize courts. On land, a corresponding system was adopted. The United States exercised the power of war against persons and places in the enemy's service or control; resorted to exchange of prisoners, cartels, and flags of truce; and treated persons taken in arms as prisoners of war. At the same time, the line was distinctly preserved between military acts,—which looked solely to a present, actual state of things, from day to day,—and civil acts, which regarded constitutional and legal rights and duties. The legal relation of the rebels, who were citizens, was that of criminals; but the political department of the government treated them practically as belligerents. This was not only on grounds of humanity, but of policy, to prevent retaliation. Yet this course pursued by the government was not a recognition of belligerent rights in the rebels, or a recognition of a legal *status* in them as belligerents. It was a course of policy from day to day, and from place to place, held under political discretion all the while; liable to be discontinued or modified as to persons or places, or altogether abandoned, in that discretion. One of the earliest cases was that of one Walter W. Smith,^[12] a citizen, who had voluntarily entered into the naval service of the rebels. He was taken and tried as a pirate, in the United States Court in Philadelphia, in October, 1861. The court (Judges Grier and Cadwallader) held that his commission, received from Jefferson Davis, could not be pleaded in defence in a judicial tribunal of the United States,—that he came within the laws of the United States punishing piracy; it being a political question solely, and not judicial, whether he should in fact be so treated. (Smith's Trial, 1861.) He was convicted of piracy, and sentenced. At the same time, the crew of the rebel privateer Savannah were put on trial before the United States Court in New York, for piracy, in having captured an American vessel. Judge Nelson held the same doctrine with that declared by the court in the case of Smith, on the main question,—that the commission by the rebel authorities was not a defence. In this case the jury disagreed. (Trial of the Savannah Pirates, New York, October, 1861.) The President suspended the sentence in the case of Smith, and held him as a prisoner of war; and the Savannah's crew were treated in the same way, and not again brought to trial. The course pursued in these causes explains the position of the rebels in this civil war. Their legal *status* was that of citizens owing allegiance, guilty of treason; and their acts of violence were crimes. The political department of the government, not contradicting the legal

[¹ For bayonets, which cannot be crossed but by force *read* bayonets, and which can be crossed only by force.]—G.G.W. [¹¹ For hostile, belligerent *read* hostile, and belligerent.]—G.G.W.

[¹² For Dobrie *read* Dobree.]—G.G.W.

[¹³ For Walter W. Smith *read* William Smith.]—G.G.W.

The latest example of this kind was the declaration of war by France against Spain, at Brussels, in [377] 1635, by heralds at arms, according to the forms observed during the middle age. The present usage is to publish a manifesto, within the territory of the State declaring war, announcing the [378] existence of hostilities, and the motives for commencing them. This publication may be necessary for the instruction and direction of the subjects of the belligerent State in respect to their intercourse with the enemy, and regarding certain effects which the voluntary law of nations attributes to war in form. Without such a declaration, it might be difficult to distinguish in a treaty of peace those acts which are to be accounted lawful effects of war, from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation.^(a)¹⁵⁴

§ 298. As no declaration, or other notice to the enemy, of the existence of war, is necessary, in order to legalize hostilities, and as the property of the enemy is, in general, liable to seizure and confiscation as prize of war, it would seem to follow as a consequence, that the property belonging to him and found within the territory of the belligerent State at the commencement of hostilities, is liable to the same fate with his other property wheresoever situated. But there is a great diversity of opinions upon this subject among institutional writers; and the tendency of modern usage between nations seems to be, to exempt such property from the operations of war.

Enemy's property found in the territory on the commencement of war, how far liable to confiscation.

One of the exceptions to the general rule, laid down by the text-writers, which subjects all the property of the enemy to capture, respects property locally situated within the jurisdiction of a neutral State; but this exemption is referred to the right of the neutral State, not to any privilege which the situation gives to the hostile owner. Does reason, or the approved practice of nations, suggest any other exception?

With the Romans, who considered it lawful to enslave, or even to kill, an enemy found within the territory of the State on the breaking out of war, it would very naturally follow that his property found in the same situation would become the spoil of the first taker. Grotius, whose great work on the laws of war and peace appeared in 1625, adopts as the basis of his opinion upon [379] this question the rules of

result, treated them as belligerents in fact,—not as belligerents *de jure*,—by a policy revocable at any time. So, any region of country, of which the rebels had an adequate military possession, was treated, for the time, as *de facto* enemy's territory, without disparagement of its constitutional *status* or of that of its inhabitants.]—D.

(a) Grotius, de Jur. Bel. ac Pac. lib. i. cap. 3, § 4. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2. Rutherford's Inst. b. ii. ch. 9, § 10. Vattel, Droit des Gens, liv. iii. ch. 4, §§ 51-56. Klüber, Droit des Gens Moderne de l'Europe, §§ 238, 239.

[¹⁵⁴ Woolsey's Introd. §§ 115, 116. Halleck, Intern. Law, 350-356. Phillimore, Intern. Law, iii. 75, 95, 96. Heffter, Europ. Völker. §§ 120, 121. See also note, *infra*, on Declaration of War.]—D.

the Roman law, but qualifies them by the more humane sentiments which began to prevail in the intercourse of mankind at the time he wrote. In respect to debts due to private persons, he considers the right to demand them as suspended only during the war, and reviving with the peace. Bynkershoek, who wrote about the year 1737, adopts the same rules, and follows them to all their consequences. He holds that, as no declaration of war to the enemy is necessary, no notice is necessary to legalize the capture of his property, unless he has, by express compact, reserved the right to withdraw it on the breaking out of hostilities. This rule he extends to things in action, as debts and credits, as well as to things in possession. He adduces, in confirmation of this doctrine, a variety of examples from the conduct of different States, embracing a period of something more than a century, beginning in the year 1556 and ending in 1657. But he acknowledges that the right had been questioned, and especially by the States-General of Holland; and he adduces no precedent of its exercise later than the year 1667, seventy years before his publication. Against the ancient examples cited by him, there is the negative usage of the subsequent period of nearly a century and a half previously to the wars of the French Revolution. During all this period, the only exception to be found is the case of the Silesian loan, in 1753. In the argument of the English civilians against the reprisals made by the King of Prussia in that case, on account of the capture of Prussian vessels by the cruisers of Great Britain, it is stated that 'it would not be easy to find an instance where a prince had⁽ⁱ⁾ thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon an engagement of honor; because a prince cannot be compelled, like other men, by⁽ⁱⁱ⁾ a court of justice. So scrupulously did England and France adhere to this public faith, that even during the war,' (alluding to the war terminated by the peace of Aix-la-Chapelle,) 'they suffered no inquiry to be made whether any part of the public debt was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours.'^(a)

Vattel's
opinion.

[380] § 299. Vattel, who wrote about twenty years after Bynkershoek, after laying down the general principle, that the property of the enemy is liable to seizure and confiscation, qualifies it by the excep-

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 16. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2, 7. Letters of Camillus, by Alexander Hamilton, No. 20.

Vattel calls the Report of the English civilians 'un excellent morceau de droit [380] des gens', (liv. ii. ch. 7, § 34,⁽ⁱⁱⁱ⁾ note a,) and Montesquieu terms it 'une réponse sans réplique.' Œuvres, tom. vi. p. 445.

[ⁱ For had read has.]—G.G.W.

[ⁱⁱ For men, by read men, in an adversary way, by.]—G.G.W.

[ⁱⁱⁱ For § 34 read § 84.]—G.G.W.

tion of real property (*les immeubles*) held by the enemy's subjects within the belligerent State, which having been acquired by the consent of the sovereign, is to be considered as on the same footing with the property of his own subjects, and not liable to confiscation *jure belli*. But he adds that the rents and profits may be sequestered, in order to prevent their being remitted to the enemy. As to debts, and other things in action, he holds that war gives the same right to them as to the other property belonging to the enemy. He then quotes the example referred to by Grotius, of the hundred talents due by the Thebans to the Thessalians, of which Alexander had become master by right of conquest, but which he remitted to the Thessalians as an act of favor: and proceeds to state, 'that the sovereign has naturally the same right over what his subjects may be indebted to the enemy; therefore he may confiscate debts of this nature, if the term of payment happen in time of war, or at least he may prohibit his subjects from paying while the war lasts. But at present, the advantage and safety of commerce have induced all the sovereigns of Europe to relax from this rigor. And as this custom has been generally received, he who should act contrary to it would injure the public faith; since foreigners have confided in his subjects only in the firm persuasion that the general usage would be observed. The State does not even touch the sums which it owes to the enemy; everywhere, in case of war, the funds confided to the public, are exempt from seizure and confiscation.' In another passage, Vattel gives the reason of this exemption. 'In reprisals, the property of subjects is seized, as well as that belonging to the sovereign or State. Every thing which belongs to the nation is liable to reprisals as soon as it can be seized, provided it be not a deposit confided to the public faith: this deposit, being found in our hands only on account of that confidence which the proprietor has reposed in our good faith, ought to be respected even in case of open war. Such is the usage in France, in England, and elsewhere, in respect to money placed by foreigners in the public funds.' Again he says, 'The sovereign declaring war can neither [381] detain those subjects of the enemy who were within his dominions at the time of the declaration, nor their effects. They came into this country on the public faith; by permitting them to enter his territories, and continue there, he has tacitly promised them liberty and perfect security for their return. He ought, then, to allow them a reasonable time to retire with their effects; and if they remain beyond the time fixed, he may treat them as enemies, but only as enemies disarmed.'^(a)

§ 300. It appears, then, to be the modern rule of international usage, that property of the enemy found within the territory of the belligerent State, or debts due to his subjects by the government or

The modern rule.

(a) Vattel, *Droit des Gens*, liv. ii. ch. 18, § 344; liv. iii. ch. 4, § 63; ch. 5, §§ 73-77.

individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war.¹⁵⁵ This rule is frequently enforced by treaty stipulations, but unless it be thus enforced, it cannot be considered as an inflexible, though an established rule. 'The rule,' as it has been beautifully observed, 'like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign—it is a guide which he follows or abandons at his will; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary.'^(a)

Rule of
reciprocity.

§ 301. Among these considerations is the conduct observed by the enemy. If he confiscates property found within his territory, or debts due to our subjects on the breaking out of war, it would certainly be just, and it may, under certain circumstances, be politic, to retort upon his subjects by a similar proceeding. This principle of reciprocity operates in many cases of international law. It is stated by Sir W. Scott to be the constant practice of Great Britain, on the breaking out of war, to condemn property seized before the war if the enemy condemns, and to restore if the enemy restores. 'It is,' says he, 'a principle sanctioned by that great foundation of the law of England, Magna Charta itself, which prescribes that, at the commencement of a war, the enemy's merchants shall be kept and treated as our [382] own merchants are kept and treated in their country.'^(a) And it is also stated in the report of the English civilians, in 1753, before referred to, in order to enforce their argument that the King of Prussia could not justly extend his reprisals to the Silesian loan, that 'French ships and effects, wrongfully taken, after the Spanish war, and before the French war, have, during the heat of the war with France, and since, been restored by sentence of your Majesty's courts to the French owners. No such ships or effects ever were attempted to be confiscated as enemy's property, here, during the war; because, had it not been for the wrong first done, these effects would not have been in your Majesty's dominions.'

Droits of
Admiralty.

§ 302. The ancient law of England seems thus to have surpassed in liberality its modern practice. In the recent maritime wars commenced by that country, it has been the constant usage to seize and condemn as droits of admiralty the property of the enemy found in its ports at the breaking out of hostilities; and this practice does not appear to have been influenced by the corresponding conduct of the

[¹⁵⁵ See note 156, *infra*, on Enemy's Property found in the Country on the breaking out of War.]—D.

(a) Mr. Chief Justice Marshall, in *Brown v. The United States*, Cranch's Rep. iii. (4) 110.

(a) The Santa Cruz, Robinson's Adm. Rep. i. 64.

[¹ For iii. read viii.]—G.G.W.

enemy in that respect. As has been observed by an English writer, commenting on the judgment of Sir W. Scott in the case of the Dutch ships, 'there seems something of subtlety in the distinction between the virtual and the actual declaration of hostilities, and in the device of giving to the actual declaration a retrospective efficacy, in order to cover the defect of the virtual declaration previously implied.'^(a)

§ 303. During the war between the United States and Great Britain, which commenced in 1812, it was determined by the Supreme Court, that the enemy's property found within the territory of the United States on the declaration of war, could not be seized and condemned as prize of war, without some legislative act expressly authorizing its confiscation. The court held that the law of Congress declaring war was not such an act. That declaration did not, by its own operation, so vest the property of the enemy in the government, as to support judicial proceedings for its seizure and confiscation. It vested only a right to confiscate, the assertion of which depended on the will of the sovereign power.

Seizure of enemy's property found within the territorial limits of the belligerent State, on the declaration of war.

[383] § 304. The judgment of the Court stated, that the universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but that it simply confers the right of confiscation.

Opinion of the Supreme Court, in *Brown v. United States*.

Between debts contracted under the faith of laws, and property acquired in the course of trade on the faith of the same laws, reason draws no distinction; and although, in practice, vessels with their cargoes found in port at the declaration of war may have been seized, it was not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade. Such a proceeding was rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect might not be uniform, that circumstance did not essentially affect the question. The inquiry was, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends upon the national will: and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts, and on other property found within the country, must be the same.

Even Bynkershoek, who maintains the broad principle, that in war

(a) Chitty's Law of Nations, ch. 3, p. 80.

every thing done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, or even poison, may be employed against him; that a most unlimited right is acquired to his person and property,—admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; ‘because,’ he says, ‘the occupation which is had by war consists more in fact than in law.’ He adds to his observations on this subject: ‘Let it not, however, be supposed that it is only true of actions that they are not condemned *ipso jure*, for other things also belonging to the enemy may be concealed and escape confiscation.’^(a)

[384] Vattel says, that ‘the sovereign can neither detain the persons nor the property of those subjects of the enemy, who are within his dominions at the time of the declaration.’

It was true that this rule was, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applied equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the enemy in the sovereign, the presence of the owner could not exempt it from this operation of war. Nor could a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property, trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

The modern rule, then, would seem to be, that tangible property belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted, stipulating for the right to withdraw such property.

This rule appeared to be totally incompatible with the idea, that war does, of itself, vest the property in the belligerent government. It might be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confis-

(a) Quod dixi de actionibus recte publicandis, ita demum obtinet, si, quod subditi [384] nostri hostibus nostris debent, princeps a subditis suis reverà exegerit. Si exegerit, rectè solutum est, si non exegerit, pace factâ reviviscit jus pristinum creditoris, quia occupatio quæ bello fit, magis in facto quam in potestate juris consistit. Nomina igitur, non exacta, tempore belli quodammodo intermori videntur, sed per pacem, genere quodam postliminii, ad priorem dominum reverti. Secundum hæc inter gentes ferè convenit, ut nominibus bello publicatis, pace deinde factâ, exacta censeantur perisse, et maneant extincta, non autem exacta reviviscant, et restituantur veris creditoribus. . . . Noli autem existimare, de actionibus duntaxat verum esse, eas ipso jure non publicari, nam nec alia quæque publicantur, quæ apud hostes, sunt et ibi fortè celantur. Unde et ea, quæ apud hostes ante bellum exortum habebamus, indictoque bello suppressa erant, atque ita non publicata, si a nostris denuo recuperentur, non fieri recuperantur, sed pristinis dominis restitui, rectè responsum est. Consil. Belg. t. iii. Consil. 67. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 7.

cate, the property of the enemy; and the rules laid down by these writers went to the exercise of this right.

The Constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that Constitution, a construction ought not lightly to [385] be admitted, which would give to a declaration of war an effect in this country it did not possess elsewhere, and which would fetter the exercise of that entire discretion respecting enemy's property, which might enable the government to apply to the enemy the rule which he applied to us.

This general reasoning would be found to be much strengthened by the words of the Constitution itself—That the declaration of war had only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results—such as a transfer of property—which are usually produced by ulterior measures of government, was fairly deducible from the enumeration of powers which accompanied that of declaring war:—‘Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.’

It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water was to be confined to captures which are extra-territorial. If it extended to rules respecting enemy's property found within the territory, then the Court perceived an express grant to Congress of the power in question as an independent, substantive power, not included in that of declaring war.

The acts of Congress furnished many instances of an opinion, that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy found at the time within the territory.

War gives an equal right over persons and property; and if its declaration was not considered as prescribing a law respecting the person of an enemy found in our country, neither did it prescribe a law for his property. The act concerning alien enemies, which conferred on the President very great discretionary powers respecting their persons, afforded a strong implication that he did not possess those powers by virtue of the declaration of war.

The act ‘for the safe-keeping and accommodation of prisoners of war,’ was of the same character.

The act prohibiting trade with the enemy contained this clause:—‘That the President of the United States be, and he is hereby authorized to give, at any time within six months after the passage [386] of this act, passports for the safe transportation of any ship or other

property belonging to British subjects, and which is now within the limits of the United States.'

The phraseology of this law showed that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act conferred on the President was manifestly considered as one which he did not previously possess.

The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, was believed to be entirely free from doubt. Was there in the act of Congress, by which war was declared against Great Britain, any expression which would indicate such an intention?

That act, after placing the two nations in a state of war, authorizes the President to use the whole land and naval force of the United States, to carry the war into effect; and 'to issue to private armed vessels of the United States commissions, or letters of marque and general reprisal, against the vessels, goods, and effects of the government of the United Kingdom of Great Britain and Ireland, and the subjects thereof.'

That reprisals may be made on enemy's property found within the United States at the declaration of war, if such be the will of the nation, had been admitted; but it was not admitted that, in the declaration of war, the nation had expressed its will to that effect.

It could not be necessary to employ argument in showing, that when the attorney for the United States institutes proceedings at law for the confiscation of enemy's property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel.

The act 'concerning letters of marque, prizes, and prize goods,' certainly contained nothing to authorize that seizure.

There being no other act of Congress which bore upon the subject, it was considered as proved that the legislature had not confiscated enemy's property, which was within the United States at the declaration of war, and that the sentence of condemnation, pronounced in the court below, could not be sustained.

[387] One view, however, had been taken of this subject, which deserved to be further considered. It was urged that, in executing the laws of war, the executive may seize, and the courts condemn, all property which, according to the modern law of nations, is subject to confiscation; although it might require an act of the legislature to justify the condemnation of that property, which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis that modern usage con-

stitutes a rule which acts directly upon the thing itself, by its own force, and not through the sovereign power. This position was not allowed. This usage was a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, was addressed to the judgment of the sovereign; and although it could not be disregarded by him without obloquy, yet it might be disregarded.

The rule was, in its nature, flexible. It was subject to infinite modifications. It was not an immutable rule of law, but depended on political considerations, which might continually vary. Commercial nations, in the situation of the United States, had always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy's property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it was proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It was proper for the consideration of the legislature, not of the executive or judiciary. It appeared to the Court that the power of confiscating enemy's property was in the legislature, and that the legislature had not yet declared its will to confiscate property which was within our territory at the declaration of war.^(b)¹⁵⁶

(b) Mr. Chief Justice Marshall, in *Brown v. The United States*, Cranch's Rep. viii. 123-129. [¹⁵⁶ *Enemy's Property found in the Country on the breaking out of War.*—The Supreme Court of the United States, in *Brown v. United States*, decided primarily and unequivocally, that, by the law of nations, the right exists to seize and confiscate any property of an enemy found in the country on the happening of war. On that point the court was unanimous. The case is so treated by all the American commentators. Kent says (i. 59) that 'the point seems no⁽¹⁾ longer open for discussion in this country, and has⁽¹¹⁾ become definitively settled in favor of the ancient and sterner rule.' [388] Halleck (p. 365) says, 'The Supreme Court of the United States has decided that the right, *stricti juris*, still exists, as a settled and undoubted right of war, recognized by the law of nations.' Woolsey (§ 118) says, 'The Supreme Court of the United States has decided, in accordance with the body of earlier and later text-writers, that by strict right such property is confiscable.'

In the cause in question, the property was not afloat as cargo, but on land and in the custody of an American citizen; and the court said, that the rule for the case must be one that could be applied to all private property and private debts. Having decided that such property was subject to forfeiture by the law of nations, the only question remaining was one of municipal or constitutional law; that is, of the validity and authority of the proceedings, under the Constitution of the United States. Still, in interpreting our Constitution, the court looked at it in the light of international law on points of public and general interest. The court held that the existence of war did not operate, *proprio vigore*, a transfer of title in such property to the United States, rendering proceedings for declaring the forfeiture rather in the nature of what is known as *office found*, in the common law; but that the existence of war only clothed the nation with the right to confiscate or not, at its option. It was upon the consequences of this doctrine, that the court divided. Judge Story, with the minority, held that, the right to confiscate existing, the power to enforce confiscation in each case was a function of the executive department of the government, as an application of known rules of war, in the same manner

[¹ For seems no *read* seems to be no.]—G.G.W.

[¹¹ For and has *read* and it has.]—G.G.W.

Debts due
to the enemy.

[388] § 305. In respect to debts due to an enemy, previously to the commencement of hostilities, the law of Great Britain pursues a

that the executive, on the declaration of war, establishes blockades, and orders the capture of enemy's property at sea, and of contraband goods. Chief Justice Marshall, with the majority of the court, held that the confiscation of such property could not be considered as the enforcing of one of the settled consequences of war, which a declaration of war might be considered as involving; for, although the right to confiscate existed, the practice of nations had so generally avoided it, and resorted to it only in special and peculiar cases, that the will of the nation could not be presumed to authorize it, by the mere fact of declaring or recognizing war. The effect of this doctrine under the Constitution was held to be, that the executive could not order confiscation, unless the will of the nation to that effect had been expressed by the authoritative organ, which was the legislative body. Kent justly remarks (i. 60), that, 'while this decision established the right, contrary to much modern practice and authority,'^[1] yet a great point was gained over the rigor and violence of the ancient doctrine, by making the exercise of the right to depend on a special Act of Congress.

Hautefeuille contends that the law of nations exempts from confiscation property found within the country on the breaking out of war, including vessels and cargoes afloat (tom. iv.^[11] p. 267; tom. iii. p. 278); but, according to the sense in which that learned author uses the terms 'droit des gens,' or 'droit international,' it does not follow that he considers his view to be sustained by the decisions of courts or practice of nations. He refers rather to treaties securing the exemption, and to the opinions of those text-writers whom he considers sound and trustworthy.

The English text-writers, like the American, are of opinion that the law of nations is not settled against the right, but, indeed, admits it. Manning, *Law of Nations*, 167. Phillimore, *Intern. Law*, i.^[111] 115-135.

In the Crimean war, Russia issued an order, in October 1852, allowing to all Turkish vessels time to depart from Russian waters; but the order is put upon the ground [389] of reciprocity,—that Turkey had not seized Russian vessels. When France and England took part in the war, those powers allowed six weeks for Russian vessels to leave port; and allowed Russian ships of commerce, not actually in the ports of England or France at the time of the declaration of war, or which left any ports of Russia destined to ports in those countries previously to the declaration, to enter such ports and remain, for the loading of their cargoes, until the expiration of six weeks from the declaration. (See French Declaration of March 27, and British Declaration of March 29, 1854.) Afterwards, further allowance was made to Russian vessels which had sailed for English or French ports before May 15, 1854, to continue their voyages, enter, discharge cargo, and depart immediately. On her part, Russia allowed French and English vessels six weeks to load and sail from ports in the Black Sea, Baltic, and Sea of Azof, and six weeks from the opening of navigation, to vessels in the White Sea. No attempts were made by any parties to this war to confiscate private property of the enemy, not maritime, remaining in the country, or private debts, or to arrest private persons; but declarations of immunity were made on each side to all such persons, with their property, as continued their residence and observed the laws. (Paris Moniteur, March 28, 1854. London Gazette, 18th April, 1854. Gazette du Commerce, 19th April, 1854. Hosack's *Law of Neutrals*,^[1v] 57; App. 112. Ortolan, ii. 443-448.)

The course pursued by these nations in the Crimean war, and the fact that nearly all nations now have treaties stipulating for time for the removal of vessels and other property in case of war, go far towards creating that change of practice which ultimately changes the law of nations. Certainly, no private property is now lost to the owner, unless its confiscation is specially ordered by the highest political authority of the State; and peace restores the exercise of the rights of ownership over all property not so condemned. Still, it cannot be said that a nation, which, for a cause it may judge sufficient, should seize and condemn such property, had violated established law, although such a course would be regarded as severe in the extreme, and out of harmony with the spirit of the age. Earl Russell, in a despatch of

[1 For while this decision established the right, contrary to much modern practice and authority read though this decision established the right, contrary to much of modern authority and practice.]—G.G.W. [11 For iv read ii].—G.G.W. [111 For i read iii].—G.G.W.

[1v For Hosack's *Law of Neutrals* read Hosack's *The Rights of British and Neutral Commerce*.]—G.G.W.

policy of a more liberal, or at least of a [389] wiser character, than in respect to droits of admiralty. A maritime power which has an overwhelming naval superiority, may have an interest, or may suppose it has an interest, in asserting the right of confiscating enemy's property, seized before an actual declaration of war; but a nation which, by the extent of its capital, must generally be the creditor of every other commercial country, can certainly have no interest in confiscating debts due to an enemy, since that enemy might, in almost every instance, retaliate with much more injurious effect. Hence, though the prerogative of confiscating such debts, and compelling their payment to the crown, still theoretically exists, it is seldom or ever⁽¹⁾ practically [390] exerted. The right of the original creditor to sue for the recovery of the debt is not extinguished; it is only suspended during the war, and revives in full force on the restoration of peace.(a)

§ 306. Such, too, is the law and practice of the United States. The debts due by American citizens to British subjects before the war of the Revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery on the restoration of peace between the two countries. The impediments which had existed to the collection of British debts, under the local laws of the different States of the Confederation, were stipulated to be removed by the treaty of peace, in 1783; but this stipulation proving ineffectual for the complete indemnification of the creditors, the controversy between the two countries on this subject was finally adjusted by the payment of a sum *en bloc* by the government of the United States, for the use of the British creditors. The commercial treaty of 1794 also contained an express declaration, that it was unjust and impolitic that private contracts should be impaired by national differences; with a mutual stipulation, that 'neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys which they may have in the public funds, or in the public or private banks, shall ever, in any event of war, or national differences, be sequestered or confiscated.'(a)

Practice of the United States, in that particular.

6th December, 1861, to the British consul at Richmond, Va., speaking of an act of the so-called Confederate Congress confiscating the property of all alien enemies (in which class were included all residents in the loyal States, whether Americans or domiciled foreigners), says, 'Whatever may have been the abstract rule of the law of nations on this point in former times, the instances of its application in the manner contemplated by the act of the Confederate Congress, in modern and more civilized times, are so rare, and have been so generally condemned, that it may be said to have become obsolete.' Parliamentary Papers, 1862, p. 108. See note 157, *infra*, on Confiscation of Private Debts, and note 169, *infra*, on Conquest and Belligerent Occupation.]—D.

(a) Bosanquet & Puller's Rep. iii. 191, *Furtado v. Rodgers*. Vesey, jun., Rep. xiii. 71. *Ex parte* Boussmaker. Edwards's Adm. Rep. 60. The Nuestra Señora de los Dolores.⁽¹¹⁾

(a) *Georgia v. Brailsford*, Dallas, iii. 4, 5. *Ware v. Hylton*, Ib. 199-285.

[¹ For ever read never.]—G.G.W.

[¹¹ The case is reported as: 'Nostra Señora de los Dolores'.]—G.G.W.

Practice of
Great
Britain and
France.

§ 307. On the commencement of hostilities between France and Great Britain, in 1793, the former power sequestrated the debts and other property belonging to the subjects of her enemy, which decree was retaliated by a countervailing measure on the part of the British government. By the additional articles to the treaty of peace between the two powers, concluded at Paris, in April, 1814, the sequestrations were removed on both sides, and commissaries were appointed to liquidate the claims of British subjects for the value of their property unduly confiscated by the French authorities, and also for the total or partial loss of the debts due to them, or other property unduly retained under sequestration, subsequently to 1792. The engage[391]ment thus extorted from France may be considered as a severe application of the rights of conquest to a fallen enemy, rather than a measure of even-handed justice; since it does not appear that French property, seized in the ports of Great Britain and at sea, in anticipation of hostilities, and subsequently condemned as droits of admiralty, was restored to the original owners under this treaty on the return of peace between the two countries.(a)

Great
Britain and
Denmark, in
that particu-
lar, in 1807.

§ 308. So, also, on the rupture between Great Britain and Denmark, in 1807, the Danish ships and other property, which had been seized in the British ports and on the high seas, before the actual declaration of hostilities, were condemned as droits of admiralty by the retrospective operation of the declaration. The Danish government issued an ordinance retaliating this seizure, by sequestrating all debts due from Danish to British subjects, and causing them to be paid into the Danish royal treasury. The English Court of King's Bench determined that this ordinance was not a legal defence to a suit in England for such a debt, not being conformable to the usage of nations; the text-writers having condemned the practice, and no instance having occurred of the exercise of the right, except the ordinance in question, for upwards of a century. The soundness of this judgment may well be questioned. It has been justly observed, that between debts contracted under the faith of laws, and property acquired on the faith of the same laws, reason draws no distinction; and the right of the sovereign to confiscate debts is precisely the same with the right to confiscate other property found within the country on the breaking out of the war. Both require some special act expressing the sovereign will, and both depend, not on any inflexible rule of international law, but on political considerations, by which the judgment of the sovereign may be guided.(a)¹⁵⁷

(a) Martens, *Nouveau Recueil*, tom. ii. p. 16.

(a) Maule & Selwyn's Rep. vi. 92, Wolff v. Oxholm. Cranch's Rep. viii. 110, Brown v. The United States.

[¹⁵⁷ *Confiscation of Private Debts due to Enemies*.—Modern writers seem to agree that no distinction in principle exists between such debts and other private property on land. (Ships

[392] § 309. One of the immediate consequences of the commencement of hostilities is, the interdiction of all commercial inter-

Trading with the enemy, unlawful on the part of subjects of the belligerent State.

and their cargoes, and commercial property at sea, have always been differently treated, for reasons given in note 171, *infra*, Distinction between Enemy's Property at Sea and on Land.) Persons who either leave their property in another country, or give credit to a foreign citizen, act on the understanding that the law of nations will be followed, whatever that may be. To argue, therefore, that the rule under the law of nations must be to abstain from confiscation because the [392] debt or property is left in the foreign country on the public faith of the country, seems to be a *petitio principii*. Kent (i. 65) states the law of nations to be, at the time of his writing, that it rests in the discretion of the legislative authority of a nation to confiscate private debts or not, at its discretion; but, as the exercise of the right is contrary to universal practice, it may 'well be considered as a wicked^[1] and impolitic right, condemned by the enlightened conscience of^[11] modern times.' Wildman (ii. 10, 11) speaks of the old rule as more or less mitigated by the wise and humane practice of modern times. Phillimore (iii. 132 *et seq.*), says, 'The strict right,—the *summum jus*,—by the reason of the thing and the opinion of every eminent jurist, remains unquestioned;' and adds, that 'the rigor of this right has been mitigated by the wise and humane^[111] practice of nations for nearly a century and a half.' Manning (p. 129)^[1v] says such debts 'may be confiscated by the rigorous application of the rights of war,^[v] but the exercise of this right has been discontinued in modern warfare.' Woolsey (§ 118) says, 'from the strict theory of hostile relations laid down above, it would follow . . . that enemy's^[vi] property within the country, at the breaking-out of war,^[vii] was liable to confiscation. This principle would also apply to^[viii] debts due to them at that time.' Halleck (pp. 362-9) agrees with Kent, that the law of nations in this respect cannot be considered as changed, so as to prohibit the confiscation. So, also, Pfeiffer, *Kriegserob.* § 14. Story, in his opinion in *Brown v. United States* (Cranch, viii. 140), says, 'I take upon me to say, that no jurist of reputation can be found who has denied the right of confiscation of enemy's debts.' Heffter (*Europ. Völker.* § 140) seems to assert a general right to seize and confiscate, but contends for a moral principle that should govern nations, which, he thinks, permits the sovereign to seize and use, or convert into money and put in his treasury, enemy's property or debts found in his dominions; but requires him to account for it, in the terms of the treaty of peace, as something of which he has had a lawful use, but the absolute title to which should not be lost by the mere fact of war. It is true, that Alexander Hamilton, in his celebrated *Camillus Letters*, in defence of Jay's Treaty (*Works*, vii. letters 18, 19, 20), argues that the public faith is pledged to the foreigner who leaves his property or debt in the country; but it should be remembered that the scope of Hamilton's argument was to justify a treaty which recognized the validity of private debts not actually confiscated, and not to question the abstract right of a nation, under the international law, to confiscate such debts, during the war, at its discretion.

The Declaration of Paris of 1856 does not touch this subject. In a great many treaties made by the United States, the confiscation of private debts is prohibited; and, in one,—that with Great Britain, 1794, art. 10,—it is pronounced 'unjust and impolitic.'

A distinction lies between private debts and debts due by the State itself to a person becoming its enemy by war. Vattel says that 'l'état ne touche pas même aux sommes qu'il doit aux ennemis; partout, les fonds confiés au public sont exempt de confiscation et de saisie en cas de guerre.' See also *Emérigon, Des Assurances*, tit. i. p. 567, and *Martens*, liv. viii. ch. 11,^[ix] § 5, to the same effect. Phillimore (iii. 135) speaks of the doctrine of the immunity of public debts as one 'which now may [393] happily be said to have no gainsayers.' Manning says such debts are 'invariably regarded^[x] during war;' and 'considers them as 'intrusted to the public faith,'^[xi] and not liable to be touched 'without a violation of public^[xii] faith.' Woolsey says (*Introd.* § 118) that 'all modern authorities agree, we believe, that they ought to be safe

[1 For wicked read naked.]—G.G.W.

[11 For conscience of read conscience and judgment of.]—G.G.W.

[111 For by the wise and humane read by the humane and wise.]—G.G.W.

[iv For p. 129 read p. 130.]—G.G.W.

[v After war a clause is omitted.]—G.G.W.

[vi For enemy's read enemies'.]—G.G.W.

[vii For of war read of a war.]—G.G.W.

[viii For would also apply to read would apply also to.]—G.G.W.

[ix For ch. 11 read ch. 2.]—G.G.W.

[x For regarded read respected.]—G.G.W.

[xi For the public faith read the faith of the nation.]—G.G.W.

[xii For of public read of the public.]—G.G.W.

course between the subjects of the States at war, without the license of their respective governments. In Sir W. Scott's judgment, in the case of *The Hoop*, this is stated to be a principle of universal law, and not peculiar [393] to the maritime jurisprudence of England. It is laid down by Bynkershoek as a universal principle of law. 'There can be no doubt,' says that writer, 'that, from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such intercourse, as is often the case, commerce is forbidden by the mere operation of the law of war. Declarations of war themselves sufficiently manifest it, for they enjoin on every subject to attack the subjects of the other prince, seize on their goods, and do them all the harm in their power. The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the law of war, as to commerce. Hence it is alternately permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus, sometimes a mutual commerce is permitted generally; sometimes as to certain merchandises only, while others are prohibited; and sometimes it is prohibited altogether. But in whatever manner it may be permitted, whether generally or specially, it is always, in my opinion, so far a suspension of the laws of war; and in this manner there is partly war and partly peace between the subjects of both countries.' (a)

and inviolable.⁽¹⁾ To confiscate either principal or interest would be a breach of good faith, injure⁽¹¹⁾ the credit of a nation, and provoke⁽¹¹¹⁾ retaliation on persons and all private property.^(1v) So Wildman, ii. 10, 11. Among the extremest measures between Great Britain and France, during the wars of Napoleon, public debts were never confiscated. Kent (i. 63, 64) considers the impolicy of such confiscation to be so clear, and its bad faith so palpable, as to remove it from the permitted acts of war.

The distinction seems to be, that a loan to a State is in the nature of a permanent investment invited by the State itself; and the implication is fairly to be made by the foreign creditor that he is not to lose it by war. The whole turns on this question,—what has the foreign creditor a right to assume will be the result in case of war? The policy of a State to have its loans open to people of all nations, as investments secure against the chances of war, is so obvious and paramount as not only to settle the practice, but to give countenance to the assumption of the creditor that the faith of the State was impliedly pledged to him to that effect. During the civil war in the United States, the Congress of the rebel confederacy confiscated all property, movable or immovable, and all rights, credits, and interests held within the confederacy by or for any alien enemy, except public stocks and securities. (Act 6th August, 1861: McPherson's Hist. of Rebellion, 203.) Earl Russell remonstrated against this proceeding as discountenanced, if not disallowed, by the modern law of nations, and as especially objectionable in civil wars. Parliam. Papers, 1862: Correspondence relating to the Civil War, 108. Abdy's Kent, 211, 212. See note 156, *ante*, Enemy's Property found in the Country on the Breaking-out of War; and note 169, *infra*, on Conquest and Belligerent Occupation.]—D.

(a) *Quamvis autem nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant, quisque enim subditus jubetur alterius Principis subditos, eorumque bona aggredi, occupare, et quomodocumque iis*

[¹ For inviolable read inviolate.]—G.G.W.

[¹¹ For faith, injure read faith, would injure.]—G.G.W.

[¹¹¹ For nation, and provoke read nation, and of its public securities, and would provoke.]—G.G.W.

[^{1v} For persons and all private property read the property of its private citizens.]—G.G.W.

It appears from these passages to have been the law of Holland. Valin states it to have been the law of France, whether the trade was attempted to be carried on in national or neutral vessels; and it appears from a case cited (in *The Hoop*) to have been the law of Spain; and it may without rashness be affirmed to be a general principle of law in most of the countries of Europe.^(b)

§ 310. Sir W. Scott proceeds to state two grounds upon which this sort of communication is forbidden. The first is, that 'by⁽ⁱⁱⁱ⁾ the law and constitution of Great Britain^(iv) the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient; but it is not for individuals to determine on the expediency of such occasions, on their own notions of commerce merely,^(v) and possibly on grounds of private advantage, not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views of policy, and of all the^(vi) circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. No principle^(vii) ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the [395] State. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and, under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?

Sir W.
Scott's de-
cision in
The Hoop.

'Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort nocere. *Utilitas verò mercantium, et quòd alter populus alterius rebus indigeat, fere jus belli, quòd ad commercia, subegit. Hinc in quoque bello aliter atque aliter commercia permittuntur vetanturque, prout e re suà subditorumque suorum esse censent Principes. Mercator populus studet commerciis frequentandis, et prout quisque alterius mercibus magis minusve carere potest, eò jus belli accomodat.*⁽¹⁾ Sic aliquando generaliter permittuntur mutua commercia, aliquando quòd ad certas merces, reliquis prohibitis, aliquando simpliciter et generaliter vetantur. Utunque autem permittas, sive generaliter, sive specialiter, semper, si me audias, quoad⁽²⁾ hæc status belli suspenditur. Pro parte sic bellum, pro parte pax erit inter subditos utriusque Principis.' Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 3.*

(b) Valin, *Comm. sur l'Ordonn. de la Marine*, liv. iii. tit. 6, art. 3.

⁽¹⁾ For accomodat read accomodat.—G.G.W.

⁽²⁾ For quoad read quod ad.—G.G.W.

⁽ⁱⁱⁱ⁾ For by read By.—G.G.W.

^(iv) For Great Britain read this country.—G.G.W.

^(v) For commerce merely read commerce and of commerce merely.—G.G.W.

^(vi) Omit the.—G.G.W.

^(vii) For No principle read In my opinion no principle.—G.G.W.

of communication, as fundamentally inconsistent with the relation existing⁽ⁱ⁾ between the two belligerent⁽ⁱⁱ⁾ countries; and that is, the total inability to sustain any contract, by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio*.⁽ⁱⁱⁱ⁾ A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection, and against its authority. Bynkershoek expresses himself with^(iv) force upon this argument, in his first book, chapter vii., where he lays down, that the legality of commerce and the mutual use of courts of justice are inseparable. He says that, in this respect, cases of commerce are undistinguishable from any other kind of cases^(v): "But if the enemy be once permitted to brig^(vi) actions, it is difficult to distinguish from what causes they may arise; nor have I been able to observe that this distinction has ever been carried into practice." ^(vii)

Sir W. Scott then notices the constant current of decisions in the British Courts of Prize, where the rule had been rigidly enforced in cases where acts of Parliament had, on different occasions, been made to relax the Navigation Law, and other revenue acts; where the government had authorized, under the sanction of an act of Parliament, a homeward trade from the enemy's posses[sions], but had not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; where strong claims, not merely of convenience, but of necessity, excused it on the part of the individual; where cargoes had been laden before the war, but the parties had not used all possible diligence to countermand the voyage, after the first notice of hostilities; and where it had been enforced, not only against British subjects, but also against those of its allies in the war, upon the supposition that the rule was founded upon a universal principle, which States allied in war had a right to notice and apply mutually to each other's subjects.

[ⁱ For relation existing *read* relation at that time existing.]—G.G.W.

[ⁱⁱ *Omit* belligerent.]—G.G.W.

[ⁱⁱⁱ *Three sentences are omitted between judicio. and A.*]—G.G.W.

[^{iv} *Insert* great before force.]—G.G.W.

[^v *Insert* quotation mark after that.]—G.G.W.

[^{vi} For brig *read* bring.]—G.G.W.

[^{vii} For in this respect, cases of commerce are undistinguishable from any other kind of cases, *read* cases of commerce are undistinguishable from cases of any other species in this respect. The quotation But if . . . into practice is not translated in the report but appears in the Latin only.]—G.G.W.

Such, according to this eminent civilian, are the general principles of the rule under which the public law of Europe, and the municipal law of its different States, have interdicted all commerce with an enemy. It is thus sanctioned by the double authority of public and of private jurisprudence; and is founded both upon the sound and salutary principle forbidding all intercourse with an enemy, unless by permission of the sovereign or State, and upon the doctrine that he who is *hostis*—who has no *persona standi in judicio*, no means of enforcing contracts,—cannot make contracts, unless by such permission.(a)

§ 311. The same principles were applied by the American courts of justice to the intercourse of their citizens with the enemy, on the breaking out of the late war between the United States and Great Britain. A case occurred in which a citizen had purchased a quantity of goods within the British territory, a long time previous to the declaration of hostilities, and had deposited them on an island near the frontier; upon the breaking out of hostilities, his agents had hired a vessel to proceed to the place of deposit, and bring away the goods; on her return she was captured, and, with the cargo, condemned as prize of war. It was contended for the claimant that this was not a trading, within the meaning of the cases cited to support the condemnation; that, on the breaking out of war, every citizen had a right, and it was the interest of the community to permit its members, to withdraw property purchased before the war, and lying in the enemy's country. But the Supreme Court determined, that whatever relaxation of the strict [397] rights of war the more mitigated and mild practice of modern times might have established, there had been none on this subject. The universal sense of nations had acknowledged the demoralizing effects which would result from the admission of individual intercourse between the States at war. The whole nation is embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because he is the enemy of his country. This being the duty of the citizen, what is the consequence of a breach of that duty? The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it. Condemnation to the captor is equally the fate of the enemy's property, and of that found engaged in an anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks. This liability of the property of a citizen to condemnation, as prize of war, may likewise be accounted for on other considerations. Every thing that issues from a hostile country is, *primâ facie*, the property of the enemy; and it is incumbent upon

Decisions of the American courts, as to trading with the public enemy. The case of *The Rapid*.

(a) *The Hoop*, Robinson's Adm. Rep. i. 196.

the claimant to support the negative of the proposition. But if the claimant be a citizen, or an ally, at the same time that he makes out his interest he confesses the commission of an offence, which, under a well-known rule of the municipal law, deprives him of his right to prosecute his claim. Nor did this doctrine rest upon abstract reasoning only: it was supported by the practice of the most enlightened, perhaps it might be said, of all commercial nations; and it afforded the Court full confidence in their judgment in this case, that they found, upon recurring to the records of the Court of Appeals in Prize Causes, established during the war of the Revolution, that, in various cases, it was reasoned upon as the established law of that Court. Certain it was, that it was the law of England before the American Revolution, and therefore formed a part of the admiralty and maritime jurisdiction conferred upon the United States Courts by their Federal Constitution. Whether the trading, in that case, was such as, in the eye of the prize law, subjects the property to capture and confiscation, depended on the legal force of the term. If by *trading*, in the law of prize, were meant that signification of the term which consists in negotiation or contract, the case would certainly not come under [398] the penalty of the rule. But the object, policy, and spirit of the rule are intended to cut off all communication, or actual locomotive intercourse, between individuals of the States at war. Negotiation or contract had, therefore, no necessary connection with the offence. Intercourse, inconsistent with actual hostility, is the offence against which the rule is directed; and by substituting this term for that of *trading with the enemy*, an answer was given to the argument, that this was not a trading within the meaning of the cases cited. Whether, on the breaking out of war, a citizen has a right to remove to his own country, with his property, or not, the claimant certainly had not a right to leave his own country for the purpose of bringing home his property from an enemy's country. As to the claim for the vessel, it was held to be founded upon no pretext whatever; for the undertaking was altogether voluntary and inexcusable.(a)

The case
of The
Alexander.

§ 312. So, where hostilities had broken out and the vessel in question, with a full knowledge of the war, and unpressed by any peculiar danger, changed her course and sought an enemy's port, where she traded and took in a cargo, it was determined to be a cause of confiscation. If such an act could be justified, it would be in vain to prohibit trade with an enemy. The subsequent traffic in the enemy's country, by which her return cargo was obtained, connected itself with a voluntary sailing for a hostile port; nor did the circumstance that she was carried by force into one part of the enemy's dominions, when her actual destination was another, break the chain. The conduct of this ship was much less to be defended than that of The Rapid.(a)

(a) The Rapid, Cranch, viii. 155.

(a) The Alexander, Cranch, viii. 169-179.

§ 313. So, also, where goods were purchased some time before the war, by the agent of an American citizen in Great Britain, but not shipped until nearly a year after the declaration of hostilities, they were pronounced liable to confiscation. Supposing a citizen had a right, on the breaking out of hostilities, to withdraw from the enemy's country his property, purchased before the war, (on which the Court gave no opinion,) such right must be exercised with due diligence, and within a reasonable time after a knowledge of hostilities. To admit a citizen to withdraw property from a hostile country a long time after the commence[399]ment of war, upon the pretext of its having been purchased before the war, would lead to the most injurious consequences, and hold out temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent, the right could not exist.^(a)

The case
of The St.
Lawrence.

§ 314. In another case, the vessel, owned by citizens of the United States, sailed from thence before the war, with a cargo or freight, on a voyage to Liverpool and the north of Europe, and thence back to the United States. She arrived in Liverpool, there discharged her cargo, and took in another at Hull, and sailed for St. Petersburg under a British license, granted the 8th of June, 1812, authorizing the export of mahogany to Russia, and the importation of a return cargo to England. On her arrival at St. Petersburg she received news of the war, and sailed to London with a Russian cargo, consigned to British merchants; wintered in Sweden, and, in the spring of 1813, sailed under convoy of a British man-of-war for England, where she arrived and delivered her cargo, and sailed for the United States in ballast, under a British license, and was captured near Boston light-house. The Court stated, in delivering its judgment, that, after the decisions above cited, it was not to be contended that the sailing with a cargo or freight, from Russia to the enemy's country, after a full knowledge of the war, did not amount to such a trading with the enemy as to subject both vessel and cargo to condemnation, as prize of war, had they been captured whilst proceeding on that voyage. The alleged necessity of undertaking that voyage to enable the master, out of the freight, to discharge his expenses at St. Petersburg, countenanced, as the master declared, by the opinion of the United States Minister there, that, by undertaking such a voyage, he would violate no law of his own country; although those considerations, if founded in truth, presented a case of peculiar hardship, yet they afforded no legal excuse which it was competent for the Court to admit as the basis of its decision. The counsel for the claimant seemed to be aware of the insufficiency of this ground, and had applied their strength to show that the vessel was not taken *in delicto*, having finished the offensive voyage in which she was

The case
of The
Joseph.

(a) The St. Lawrence, Cranch, viii. 434. Ib. ix. 120.

engaged in the enemy's country, and having been captured on her return home in ballast. It was not denied that, [400] if she had been taken in the same voyage in which the offence was committed, she would be considered as still *in delicto*, and subject to confiscation; but it was contended that her voyage terminated at the enemy's port, and that she was on her return, on a new voyage. But the Court said, that even admitting that the outward and homeward voyage could be separated, so as to render them two distinct voyages, still, it could not be denied that the *termini* of the homeward voyage were St. Petersburg and the United States. The continuity of such a voyage could not be broken by a voluntary deviation of the master, for the purpose of carrying on an intermediate trade. That the going from the neutral to the enemy's country was not undertaken as a new voyage, was admitted by the claimants, who alleged that it was undertaken as subsidiary to the voyage home. It was, in short, a voyage from the neutral country, by the way of the enemy's country; and, consequently, the vessel, during any part of that voyage, if seized for any conduct subjecting her to confiscation as prize of war, was seized *in delicto*.^(a)

§ 315. We have seen what is the rule of public and municipal law on this subject, and what are the sanctions by which it is guarded. Various attempts have been made to evade its operation, and to escape its penalties; but its inflexible rigor has defeated all these attempts. The apparent exceptions to the rule, far from weakening its force, confirm and strengthen it. They all resolve themselves into cases where the trading was with a neutral, or the circumstances were considered as implying a license, or the trading was not consummated until the enemy had ceased to be such. In all other cases, an express license from the government is held to be necessary, to legalize commercial intercourse with the enemy.^(a)¹⁵⁸

(a) The Joseph, Cranch, viii. 451, 455.

(a) The Franklin, Robinson's Adm. Rep. vi. 127; The Madonna delle Gracie, Ib. iv. 195; The Juffrow Catharina, Ib. v. 141; The Abby, Ib. 251. Wheaton's Rep. ii., Appendix, Note I. p. 34. Wheaton on Captures, 220-223.

¹⁵⁸ *Intercourse with the Enemy*.—In the Crimean war, the rule of non-intercourse with the enemy was greatly relaxed by the belligerents; but it was done by orders and proclamations in advance, professedly relaxing a rule which otherwise the courts of prize would have been obliged to apply. The Order in Council of 15th April, 1854, permitted British subjects to trade freely at Russian ports not blockaded, in neutral vessels, and in articles not contraband, but not in British vessels. (London Gazette, April 18, 1854.) The French orders were to the same effect. The Russian Declaration of 19th April permits French and English goods, the property of French [401] or English citizens, to be imported into Russia in neutral vessels. (London Gazette, May 2, 1864.) The French and Russian Governments allowed private communications, not contraband in their nature, to be exchanged between their subjects by telegraph. (Courrier des États Unis, 23d July, 1855.)

The subject is not touched by the Declaration of Paris of 1856. The Orders in Council must therefore be considered as a special relaxation, adopted from reasons of policy applicable to that war, and as to which each nation must judge for itself in any future war. In the debates in Parliament, and in speeches made by public men in the commercial cities, as well as in the

[401] § 316. Not only is such intercourse with the enemy, on the part of the subjects of the belligerent State, prohibited and punished

Trade with the common enemy, unlawful on the part of allied subjects.

memorials of merchants, and in contributions to the press, during and soon after the Crimean war, there was a strong disposition evinced to have all trade left free, and to confine the operation of wars to government property and persons or vessels in public belligerent employment. It was said that the commerce of England was too vast to be protected by her navy, and that she would lose more than she could gain in a contest of captures with any power; and that, if direct trade with enemies was not permitted, the only result would be, that neutrals would carry the cargoes, and the belligerents would not be crippled in commerce or resources, except as to the employment of their own ships and sailors,—a result which would not operate to the advantage of England. The argument on the other hand was, the necessity of requiring each citizen to follow the fortunes of his country in war. In the words of Judge Story, in *The Julia* (Cranch, viii. 181), 'Can an American citizen be permitted in this manner to carve out for himself a neutrality on the ocean when his country is at war?'^[1] Can an engagement be legal which confirms in⁽¹¹⁾ him the temptation or necessity of deeming his personal interests at variance with the legitimate objects of his government? Sir R. Palmer, the Attorney-General, said, 'A political war and a commercial peace are inconsistent;' and he presented cogently the necessity of having it understood beforehand, that each citizen's interest should be involved in the war, and liable to its fortunes, as a means of carrying home a serious sense of responsibility to all classes for engaging in war, as well as a means of making war thorough and decisive, and therefore short and of more rare occurrence.

The truth is, the most humane and often the most efficient part of war is that which consists in stopping the commerce and cutting off the material resources of the enemy. If cutting off our commerce with him, and his with us, cripples and embarrasses him, it must be done. Driving his general commerce from the sea, and blockading his ports to keep neutral commerce from him, must diminish his resources, and tend to coerce him. It is the least objectionable part of warfare. It takes no lives, sheds no blood, imperils no households; has its field on the ocean, which is a common highway; and deals only with persons and property voluntarily embarked in the chances of war, for the purpose of gain, and with the protection of insurance. War is not a game of strength between armies or fleets, nor a competition to kill the most men and sink the most vessels, but a grand national appeal to force, to secure an object deemed essential, when every other appeal has failed. The purpose of using force is to coerce your enemy to the act of justice assumed to be necessary. It is [402] hazardous to lay down absolute rules in advance for all nations, under all circumstances, limiting possible means of coercion. Nations should have it in their power to coerce the body politic they are at war with, by a coercion applied to all its citizens in all their interests, and to identify the private interests of each of their own subjects with the national fortunes in the war. It must be assumed that the war is a national act, resorted to from an overpowering necessity for the protection of all; and those responsible for it must remember, that the extremities to which it may reduce a nation, and the means to which it may be necessary to resort, cannot be measured in advance. The controlling motive of every citizen, whether combatant or non-combatant, should be to have the war brought to a close as soon as possible, and to do all that is necessary to that end, consistently with humanity. The policy of exerting this or that legitimate mode of coercion must be left to depend on the circumstances of each case.

Heffter (§§ 122, 123) suggests, that a declaration of war does not of itself prohibit commercial intercourse; but that such intercourse may go on, unless specially prohibited, and so far as not so prohibited. This must, however, be considered rather as an opinion on what is desirable, than as a statement of law; for all precedent and practice, and the opinions of all jurists, are the other way. The reasons which influenced him appear in the passage itself, where he speaks of citizens as 'die Unterthanen der streitenden Theile,' of whose right of commerce he says, 'die Handelsfreiheit der Einzelnen nicht erst von dem Staate kommt, sondern von denselben nur seine Beschränkungen zu empfangen hat.' The wars on the continent of Europe have been so often mere manœuvres of dynasties supported by their standing armies, in which the people have no interest, that a desire to free the people from their consequences is not unnatural in a continental writer; but different principles are applicable to States conducted by a self-governing people.]—D.

[¹ After war? two sentences are omitted.]—G.G.W.

[¹¹ For confirms in *read* imposes upon.]—G.G.W.

with confiscation in the Prize Courts of their own country, but, during a conjoint war, no subject of an ally can trade with the common enemy, without being liable to the forfeiture, in the Prize Courts of the [402] ally, of his property engaged in such trade. This rule is a corollary of the other; and is founded upon the principle, that such trade is forbidden to the subjects of the co-belligerent by the municipal law of his own country, by the universal law of nations, and by the express or implied terms of the treaty of alliance subsisting between the allied powers. And as the former rule can be relaxed only by the permission of the sovereign power of the State, so this can be relaxed only by the permission of the allied nations, according to their mutual agreement. A declaration of hostilities naturally carries with it an interdiction of all commercial intercourse. Where one State only is at war, this interdiction may be relaxed, as to its own subjects, without injuring any other State; but when allied nations are pursuing a common cause against a common enemy, there is an implied, if not an express contract, that neither of the co-belligerent States shall do any thing to defeat the common object. If one State allows its subjects to carry on an uninterrupted trade with the enemy, the consequence will be, that it will supply aid and comfort to the enemy, which may be injurious to the common cause. It should seem that it is not enough, therefore, to satisfy the Prize Court of one of the allied States, to [403] say that the other has allowed this practice to its own subjects; it should also be shown, either that the practice is of such a nature as cannot interfere with the common operations, or that it has the allowance of the other confederate State.^(a)

Contracts
with the
enemy pro-
hibited.

§ 317. It follows, as a corollary from the principle interdicting all commercial and other pacific intercourse with the public enemy, that every species of private contract made with his subjects during the war is unlawful. The rule thus deduced is applicable to insurance on enemy's property and trade; to the drawing and negotiating of bills of exchange between subjects of the powers at war; to the remission of funds, in money or bills, to the enemy's country; to commercial partnerships entered into between the subjects of the two countries, after the declaration of war, or existing previous to the declaration; which last are dissolved by the mere force and act of the war itself, although, as to other contracts, it only suspends the remedy.^(a)¹⁵⁹

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10. Robinson's Adm. Rep. iv. 251; vi. 403, The Neptunus.

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 21. Duponceau's Transl. 165, note. Kent's Commentaries, i. 67, 68.

¹⁵⁹ Halleck's Intern. Law, 357. Phillimore's Intern. Law, iii. § 70. Heffter, Europ. Völker. §§ 122, 128. Manning's Law of Nations, 122-3. The Rapid, Cranch, viii. 155. The Hoop, Robinson, i. 196. The Joseph, Cranch, viii. 451, 455. Indian Chief, Robinson, iii. 22.]—D.

§ 318. Grotius, in the second chapter of his third book, where he is treating of the liability of the property of subjects for the injuries committed by the State to other communities, lays down that 'by the law of nations, all the subjects of the offending State, who are such from a permanent cause, whether natives or emigrants from another country, are liable to reprisals, but not so those who are only travelling or sojourning for a little time;—for reprisals,' says he, 'have been introduced as a species of charge imposed in order to pay the debts of the public; from which are exempt those who are only temporarily subject to the laws. Ambassadors and their goods are, however, excepted from this liability of subjects, but not those sent to an enemy.' In the fourth chapter of the same book, where he is treating of the right of killing and doing other bodily harm to enemies, in what he calls *solemn war*, he holds that this right extends, 'not only to those who bear arms, [404] or are subjects of the author of the war, but to all those who are found within the enemy's territory. In fact, as we have reason to fear the hostile intentions even of strangers who are within the enemy's territory at the time, that is sufficient to render the right of which we are speaking applicable even to them in a general war. In which respect there is a distinction between war and reprisals, which last, as we have seen, are a kind of contribution paid by the subjects for the debts of the State.'^(a)

Persons domiciled in the enemy's country liable to reprisals. Opinion of Grotius.

§ 319. Barbeyrac, in a note collating these passages, observes, that 'the late M. Cocceius, in a dissertation which I have already cited, *De Jure Belli in Amicos*, rejects this distinction, and insists that even those foreigners who have not been allowed time to retire ought to be considered as adhering to the enemy, and for that reason justly exposed to acts of hostility. In order to supply this pretended defect, he afterwards distinguishes foreigners who remain in the country, from those

Opinion of Barbeyrac and Cocceius.

(a) 'Cæterum non minus in hac materiâ quàm in aliis cavendum est, ne confundamus ea quæ juris gentium sunt propriæ, et ea quæ jure civili aut pactis populorum constituuntur.

'Jure gentium subjacent pignorationi omnes subditi injuriam facientes,^[1] qui tales sunt ex causâ permanente, sive indigenæ sive advenæ, non qui transeundi aut moræ exiguæ causâ alicubi sunt. Introductæ enim sunt pignorationes ad exemplum onerum, quæ pro exsolvendis debitis publicis inducuntur, quorum immunes sunt qui tantum pro tempore loci legibus subsunt. A numero tamen subditorum jure gentium excipiuntur legati, non ad hostes nostros missi, et res eorum.' Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 2, § 7, No. 1.

'Latè autem patet hoc jus licentiæ, nam primum non eos tantum comprehendit qui actu ipso arma gerunt, aut qui bellum moventis subditi sunt, sed omnes etiam qui intra fines sunt hostiles: quod apertum fit ex ipsâ formulâ apud Livium, *Hostis sit ille, quique intra præsidia ejus sunt*; nimirum quia ab illis quoque damnum metui potest, quod in bello continuo et universali sufficit ut locum habeat jus de quo agimus: aliter quàm in pignorationibus, quæ, ut diximus, ad exemplum onerum impositorum ad luenda civitatis debita, introductæ sunt: quære^[11] mirum non est, si, quod Baldus notat, multò plus licentiæ sit in bello quàm in pignorandi jure. Et hoc quidem quod dixi in peregrinis, qui commisso cognitoque bello intra fines hosticos veniunt, dubitationem non habet.

'At qui ante bellum eo iverant, videntur jure gentium pro hostibus haberi, post modicum tempus intra quod discedere potuerant.' Ib. lib. iii. cap. 4, §§ 6-7.

[1] For facientes read facientis.]—G.G.W.

[11] For quære read quare.]—G.G.W.

who only transiently pass through it, and are constrained by sickness or the necessity of their affairs. But this is alone sufficient to show that, in this place, as in many others, he criticised our author without understanding him. In the following paragraph, Grotius manifestly distinguishes from the foreigners of whom he has just spoken those who are permanent subjects of the [405] enemy, by whom he doubtless understands, as the learned Gronovius has already explained, those who are *domiciled* in the country. Our author explains his own meaning in the second chapter of this book, in speaking of reprisals, which he allows against this species of foreigners, whilst he does not grant them against those who only pass through the country, or are temporarily resident in it.’(a)

Whatever may be the extent of the claims of a man’s native country upon his political allegiance, there can be no doubt that the natural-born subject of one country may become the citizen of another, in time of peace, for the purposes of trade, and may become entitled to all the commercial privileges attached to his required⁽¹⁾ domicile. On the other hand, if war breaks out between his adopted country and his native country, or any other, his property becomes liable to reprisals in the same manner as the effects of those who owe a permanent allegiance to the enemy State.

Species
of residence
constituting
domicil.

§ 320. As to what species of residence constitutes such a domicile as will render the party liable to reprisals, the text-writers are deficient in definitions and details. Their defects are supplied by the precedents furnished by the British prize courts, which, if they have not applied the principle with undue severity in the case of neutrals, have certainly not mitigated it in its application to that of British subjects resident in the enemy’s country on the commencement of hostilities.

The case of
St. Eustatius.

§ 321. In the judgment of the Lords of Appeal in Prize Causes, upon the cases arising out of the capture of St. Eustatius by Admiral Rodney, delivered in 1785, by Lord Camden, he stated that ‘if a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, he thought it would be hard to seize upon his goods; but a residence, not attended with these circumstances, ought to be considered as a permanent residence.’ In applying the evidence and the law to the resident foreigners in St. Eustatius, he said, that ‘in every point of view, they ought to be considered resident subjects. Their persons, their lives, their industry, were employed for the benefit of the State under whose protection they lived; and, if war broke out, they, continuing to reside there, paid their pro[406]portion of taxes, imposts, and the like, equally with natural-born subjects, and no doubt come within that description.’(a)

(a) Grotius, par Barbeyrac, *in loc.*

(a) MS. Proceedings of the Commissioners under the treaty of 1794, between Great Britain and the United States. Opinion of Mr. W. Pinkney, in the case of *The Betsey*.

[¹ For required *read* acquired.]—G.G.W.

§ 322. 'Time,' says Sir W. Scott, 'is the grand ingredient in constituting domicile. ⁽ⁱ⁾In most cases, it is unavoidably conclusive. It is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect to ⁽ⁱⁱ⁾the time which such a purpose may or shall occupy; for if the purpose be of such a nature as *may probably*, ⁽ⁱⁱⁱ⁾or *does actually*, detain the person for a great length of time, ^(iv)a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. ^(v)Against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him, and mixed themselves with the ^(vi)original design, and impressed upon him the character of the country where he resided. Supposing ^(vii)a man comes into a belligerent country at or before the beginning of the ^(viii)war, it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disentangle ^(ix)himself; but if he continues to reside during a good part of the war, contributing by the ^(x)payment of taxes and other means to the strength of that country, ^(xi)he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the frauds ^(xii)and abuses of masked, pretended, original, and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the time *à priori*, but such a rule ^(xiii)there *must* be. In proof of the efficacy of mere time, it is not impertinent to remark that the same quantity of business which would not fix a domicile in a certain quantity ^(xiv)of time, would nevertheless have that effect if distributed over a larger space of time. ^(xv)This matter ^(xvi)is to be taken in the compound ratio of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, with but ^(xvii)few exceptions, that mere length of time shall not constitute a domicile.' (a)

The case of The Harmony.

[407] § 323. In the case of The Indian Chief, determined in 1800, Mr. Johnson, a citizen of the United States, domiciled in England, had

The case of The Indian Chief.

(a) The Harmony, Robinson's Adm. Rep. ii. 324.

[ⁱ Before In a clause is omitted.]—G.G.W.

[ⁱⁱ For respect to read respect had to.]—G.G.W.

[ⁱⁱⁱ For of such a nature as *may probably* read of a nature that *may probably*.]—G.G.W.

[^{iv} Before a general residence a clause is omitted.]—G.G.W.

[^v Before Against such a sentence and a clause are omitted.]—G.G.W.

[^{vi} For the read his.]—G.G.W.

[^{vii} For Supposing read Suppose.]—G.G.W.

[^{viii} For the read a.]—G.G.W.

[^{ix} For disentangle read disengage.]—G.G.W.

[^x Omit the.]—G.G.W.

[^{xi} Before he could a clause is omitted.]—G.G.W.

[^{xii} For frauds read fraud.]—G.G.W.

[^{xiii} For rule read time.]—G.G.W.

[^{xiv} For quantity read space.]—G.G.W.

[^{xv} Before This a sentence and clauses are omitted.]—G.G.W.

[^{xvi} Omit This matter.]—G.G.W.

[^{xvii} For with but read but with.]—G.G.W.

engaged in a mercantile enterprise to the British East Indies, a trade prohibited to British subjects, but allowed to American citizens under the commercial treaty of 1794, between the United States and Great Britain. The vessel came into a British port on its return voyage, and was seized as engaged in illicit trade. Mr. Johnson, having then left England, was determined not to be a British subject at the time of capture, and restitution was decreed. In delivering his judgment in this case, Sir W. Scott said, 'Taking⁽ⁱ⁾ it to be clear that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held, that, from the moment he turned⁽ⁱⁱ⁾ his back on the country where he had⁽ⁱⁱⁱ⁾ resided, on his way to his own country, he was in the act of resuming his original character, and must be^(iv) considered as an American. The character that is gained by residence, ceases by non-residence. It is an adventitious character, and^(v) no longer adheres to him from the moment that he puts himself in motion, *bonâ fide*, to quit the country, *sine animo revertendi*.'^(a)

The native
character
easily re-
verts.

§ 324. The native character easily reverts, and it requires fewer circumstances to constitute domicil, in the case of a native subject, than to impress the national character on one who is originally of another country. Thus, the property of a Frenchman who had been residing, and was probably naturalized, in the United States, but who had returned to St. Domingo, and shipped from thence the produce of that island to France, was condemned in the High Court of Admiralty.^(a)

In *The Indian Chief*, the case of Mr. Dutilth is referred to by the claimant's counsel, as having obtained restitution, though *at the time of sailing* he was resident in the enemy's country; but the decision of the Lords of Appeal, in 1800, is mentioned by Sir C. Robinson, in which different portions of Mr. Dutilth's property were condemned or restored, according to the circumstances of his residence at the time of capture. That decision is more particularly stated by Sir J. Nicholl, at the hearing of the case of *The Harmony* before the Lords, July 7, 1803. 'The case of Mr. Dutilth also illustrates the present. He came to Europe about the end of July, 1793, at the time when there was a great deal of alarm on account of the state of commerce. He went to Holland, then not only in a state of amity, but of alliance with this country; he continued there until the French entered. During the

(a) *The Indian Chief*, Robinson's Adm. Rep. iii. 12.

(a) *La Virginie*, Robinson's Adm. Rep. v. 99. The same rule is also adopted in the prize law of France, Code des Prises, tom. i. pp. 92, 139, 303, and by the American prize courts, *The Dos Hermanos*, Wheaton's Rep. ii. 76.

[ⁱ For Sir W. Scott said, 'Taking *read* 'Sir W. Scott said, . . . taking.]-G.G.W.

[ⁱⁱ For turned *read* turns.]-G.G.W.

[ⁱⁱⁱ For had *read* has.]-G.G.W.

[^{iv} For must be *read* is to be.]-G.G.W.

[^v For and *read* which.]-G.G.W.

whole time he was there, he was without any establishment; he had no counting-house; he had no contracts nor dealings with contractors there; he employed merchants there to sell his property, paying them a commission. Upon the French entering into Holland, he applied for advice to know what was left for him to do under the circumstances, having remained there on account of the doubtful state of mercantile credit, which not only affected Dutch and American, but English houses, who were all looking after the state of credit in that country. In 1794, when the French came there, Mr. Dutilth applied to Mr. Adams, the American Minister, who advised him to stay until he could get a passport. He continued there until the latter end of that year, and, having wound up his concerns, came away. Some part of his property was captured before he came there. That part which was taken before he came there was restored to him, (*The Fair American*, Adm., 1796,) but that part which was taken while he was there was condemned, and *that* because he was in Holland at the time of the capture.' *The Hannibal and Pomona*, Lords, 1800.^(b)

§ 325. The case of *The Diana*, determined by Sir W. Scott, in 1803, is also full of instruction on this subject. During the war which commenced in 1795 between Great Britain and Holland, the colony of Demerara surrendered to the British arms, and by the treaty of Amiens it was restored to the Dutch. That treaty contained an article allowing the inhabitants, of whatever country they might be, a term of three years, to be computed from the notification of the treaty, for the purpose of disposing of their effects acquired before or during the war, in which term they might have the free enjoyment of their property. Previous to the declaration of war against Holland, in 1803, *The Diana* and several other vessels, laden with colonial produce, were captured on a voyage from Demerara to Holland. Immediately after the declaration, and before the expiration of the three years from the notification of the treaty of Amiens, Demerara again surrendered to Great Britain. Claims to the captured property were filed by original British subjects, inhabitants of Demerara, some of whom had settled in the colony while it was in possession of Great Britain; others before that event. The cause came on for hearing after it had again become a British colony.

The case of
The Diana.

(b) Wheaton's Rep. ii. Appendix, 27, 28, 29.⁽¹⁾

[¹ These pages of 2 Wheaton, Appendix, 27, 28, 29, do not mention *The Hannibal* and *The Pomona* but cite cases among which is *The Indian Chief*, 3 Rob. 12. In a footnote to this case, Robinson refers to the *Hannibal* and *Pomona*.

For *The Hannibal*, August 11, 1798: See manuscript, Prize Appeal Interlocutories, No. 2, July 1798 to February 1800; Public Records Office, London;

For *The Pomona*, March 8, 1800: See *ibid.*, No. 3, March 1800 to June 1801, and Assignment Books, Series II, vol. 26, fol. 46;

For *The Hannibal*, March 8, 1800: See *ibid.*

For *The Pomona*, August 9, 1800: See manuscript, Prize Appeal Interlocutories, No. 3, March 1800 to June 1801, and Admiralty High Court Prize Appeals, Assignment Books, Series II, vol. 29, fol. 26.]—G.G.W.

Sir W. Scott decreed restitution to those British subjects who had settled in the colony while in British possession, but condemned the property of those who had settled there before that time. He held that those of the first class, by settling in Demerara while belonging to Great Britain, afforded a presumption of their intending to return, if the island should be transferred to a foreign power, which presumption, recognized by the treaty, relieved those claimants from the necessity of proving such intention. He thought it reasonable that they should be admitted to their *jus postliminii*, and he held them entitled to the protection of British subjects. But he was clearly of opinion that 'mere recency of establishment would not avail, if the intention of making a permanent residence there was fixed^{<i>} upon the party. The case of Mr. Whitehill fully established this point. He had arrived at St. Eustatius only a day or two before Admiral Rodney and the British forces made their appearance; but it was proved that he had gone to establish himself there, and his property was condemned. Here recency, therefore, would not be sufficient.'

But the property of those claimants who had settled in Demerara before that colony came into the possession of Great Britain, was condemned. ^{<u>}'Having settled without any faith in British possession, it cannot be supposed,' he said, 'that they would have relinquished their residence because that possession had ceased. They had passed from one sovereignty with^{<iii>} indifference; and if they may be supposed to have looked again to a connection with this country, they must have viewed it as a circumstance that was in no degree likely to affect their intention of remaining^{<iv>} there.^{<v>} On the situation of persons settled there previous to the time of British possession, I feel myself obliged to pronounce, that they must be considered in the same light as persons resident in Amsterdam. It must be understood, however, that if there were among these any who were^{<vi>} actually removing, and that fact is properly ascertained, their goods may be capable of restitution. [410] All that I mean to express is, that there must be evidence of an intention to remove on the part of those who settled prior to British possession, the presumption not being in their favor.'^(a)

Case of The Ocean. Persons removing from the enemy's country on the breaking out of war.

§ 326. The case of *The Ocean*, determined in 1804, was a claim relating to British subjects settled in foreign States in time of amity, and taking early measures to withdraw themselves on the breaking out of war. It appeared that the claimant had been settled as a partner in a house of trade in Holland, but that he had made arrangements for

(a) *The Diana*, Robinson's Adm. Rep. v. 60.

^{<i>} For was fixed read was fully fixed.]—G.G.W.

^{<u>} Delete quotation mark before Having and insert before settled.]—G.G.W.

^{<iii>} For sovereignty with read sovereignty to another with.]—G.G.W.

^{<iv>} For remaining read continuing.]—G.G.W.

^{<v>} After there five sentences are omitted.]—G.G.W.

^{<vi>} For were read have been.]—G.G.W.

the dissolution of the partnership, and was prevented from removing personally only by the violent detention of all British subjects who happened to be within the territories of the enemy at the breaking out of the war. In this case Sir W. Scott said: 'It would, I think,⁽ⁱ⁾ be going further than the law⁽ⁱⁱ⁾ requires, to conclude this person by his former occupation, and by his present constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution.'^(a)

In a note to this case, Sir C. Robinson states that the situation of British subjects, wishing to remove from the enemy's country on the event of a war, but prevented by the sudden occurrence of hostilities from taking measures sufficiently early to obtain restitution, formed not unfrequently a case of considerable hardship in the Prize Court. He advises persons so situated, on their actual removal, to make application to government for a special pass, rather than to trust valuable property to the effect of a mere intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution. And Sir W. Scott, in the case of *The Dree Gebroeders*, observes, ⁽ⁱⁱⁱ⁾ 'that pretences of withdrawing funds are, at all times, to be watched with considerable jealousy; but when the transaction appears to have been conducted *bonâ fide* with that view, and to be directed only to the removal of property, which the accidents of war may have lodged in the belligerent country, cases of this kind^(iv) are entitled to be treated with some indulgence.' But in a subsequent case, where an indulgence was allowed by the court for the withdrawal of British property under peculiar circum[411]stances, he intimated that the decree of restitution, in that particular case, was not to be understood as in any degree relaxing the necessity of obtaining a license, wherever property is to be withdrawn from the enemy's country.^(b)

§ 327. The same principles, as to the effect of domicil, or commercial inhabitaney in the enemy's country, were adopted by the prize tribunals of the United States, during the late war with Great Britain. The rule was applied to the case of native British subjects, who had emigrated to the United States long before the war, and became naturalized citizens under the laws of the Union, as well as to native citizens residing in Great Britain at the time of the declaration. The

Decisions of
the American
courts.
The Venus.

(a) Ibid. 91.

(b) *Dree Gebroeders*, Robinson's Adm. Rep. iv. 234; *The Juffrow Catharina*, Ib. v. 141.

[ⁱ After think, a clause is omitted.]—G.G.W.

[ⁱⁱ For the law read the principle of law.]—G.G.W.

[ⁱⁱⁱ Delete quotation mark before that and insert before are.]—G.G.W.

[^{iv} For kind read description.]—G.G.W.

naturalized citizens in question had, long prior to the declaration of war, returned to their native country, where they were domiciled and engaged in trade at the time the shipments in question were made. The goods were shipped before they had a knowledge of the war. At the time of the capture, one of the claimants was yet in the enemy's country, but had, since he heard of the capture, expressed his anxiety to return to the United States, but had been prevented by various causes set forth in his affidavit. Another had actually returned some time after the capture, and a third was still in the enemy's country.

In pronouncing its judgment in this case, the Supreme Court stated that, there being no dispute as to the facts upon which the domicil of the claimants was asserted, the questions of law to be considered were two: *First*, by what means, and to what extent, a national character may be impressed upon a person, different from that which permanent allegiance gives him? and, *secondly*, what are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or that in which he had been naturalized?

The *Venus*,
continued.
National
character
different
from that of
permanent
allegiance.

§ 328. Upon the first of these questions, the opinions of the text-writers and the decisions of the British Courts of Prize already cited, were referred to; but it was added that, in deciding whether a person has obtained the right of an acquired domicil, it was not to be expected that much, if any assistance, should be derived [412] from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of courts of justice to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicil has sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he has made no express declaration on the subject, and his secret intention is to be discovered, his *acts* must be attended to as affording the most satisfactory evidence of his intention. On this ground the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidences of an intention permanently to reside there, as to stamp him with the national character of the State where he resides. In questions on this subject, the chief point to be considered is the *animus manendi*; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appears that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by residence even of a few days. This was one of the rules of the British Prize Courts, and it appeared to be perfectly reasonable. Another was that a neutral or subject, found residing in a foreign country, is pre-

sumed to be there *animo manendi*; and if a State at war should bring his national character into question, it lies upon him to explain the circumstances of his residence. As to some other rules of the Prize Courts of England, particularly those which fix the national character of a person, on the ground of constructive residence or the peculiar nature of his trade, the court was not called upon to give an opinion at that time; because, in the present case, it was admitted that the claimants had acquired a right of domicil in Great Britain at the time of the breaking out of war between that country and the United States.

§ 329. The next question was, what are the consequences to which this acquired domicil may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes permanent allegiance. A neutral, in this situation, if he should engage in open hostilities with the other belligerent, would be considered and [413] treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance; but although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such with reference to the seizure of so much property concerned in the enemy's trade as is connected with his residence. It is found adhering to the enemy; he is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or perhaps refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals, and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent State domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with the rest of the world.

§ 330. But this national character which a man acquires by residence may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he resided, on his way to another. The reasonableness of this rule can hardly be disputed. Having once acquired a national character, by residence in a foreign country, he ought to be bound by all the consequences of it until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bonâ fide*, and without an intention of returning. If any thing short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a *bonâ fide* intention should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or at least rendered doubtful, by a

The Venus,
continued.
The consequences of
acquiring
such a
national
character.

The Venus,
continued.
The throwing-off this
acquired
national
character.

continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies these declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual [414] removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put in his power to claim whichever may best suit his purpose, when it is called in question? If his property be taken trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the enemy's country to his own, then neutral, and therefore that, as a neutral, the trade was to him lawful? If war exists between the country of his residence and his native country, and his property be seized by the former or by the latter, shall he be heard to say, in the former case, that he was a domiciled subject in the country of the captor; and in the latter that he was a native subject of the country of that captor also, because he had declared an intention to resume his native character, and thus to parry the belligerent rights of both? It was to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned had been adopted. Upon what sound principle could a distinction be framed between the case of a neutral, and the subject of one belligerent domiciled in the country of the other, at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonged to them, before the war, in their character of subjects of that country, so long as they continued to retain their domicile; and when war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows that this property, which was once the property of a friend, belongs now to him who, in reference to that property, is an enemy.

The Venus,
continued.
Effect of
retaining
the foreign
domicil.

§ 331. This doctrine of the common-law courts and prize tribunals of England is founded, like that mentioned under the first head, upon international law, and was believed to be strongly supported by reason and justice. And why, it might be confidently asked, should not the property of enemy's subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicile, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound by such residence to the society of which they were members, subject to the laws of the State, and [415] owing a qualified allegiance thereto. They

are obliged to defend it, (with an exception of such subject with relation to his native country,) in return for the protection it affords them, and the privileges which the laws bestow upon them, as subjects. The property of such persons, equally with that of the native subjects in their locality, is to be considered as the goods of the nation, *in regard to other States*. It belongs in some sort to the State, from the right which the State has over the goods of its citizens, which make a part of the sum total of its riches, and augment its power. Vattel, liv. i. ch. 14, § 182. 'In reprisals,' continues the same author, 'we seize on the property of the subject, just as on that of the sovereign; every thing that belongs to the nation is subject to reprisals, wherever it can be seized, with the exception of a deposit intrusted to the public faith.' Liv. ii. ch. 18, § 344. Now if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the nation, it would seem difficult to maintain that the same consequences would not follow, in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation.

If, then, nothing but an actual removal, or a *bonâ fide* beginning to remove, could change a national character acquired by domicil; and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person, in his character of a subject; what was there that did or ought to exempt it from capture by the cruisers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent?

§ 332. It was contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes permanent allegiance; and that, until such election be made, his property ought to be protected from capture by the cruisers of the latter. This doctrine was believed to be as unfounded in reason and justice, as it clearly was in law. In the first place, it was founded upon a presumption that the person will certainly remove, [416] before it can possibly be known whether he may elect to do so or not. It was said, that the presumption ought to be made, because, upon receiving information of the war, it would be his duty to return home. This position was denied. It was his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; nor would any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse permission to him to withdraw whenever he wished to do so, unless under peculiar

The Venus,
continued.
Reasonable
time to
change
domicil after
beginning of
war.

circumstances, which, by such removal, at a critical period, might endanger the public safety. The conventional law of nations was in conformity with these principles. It is not uncommon to stipulate in treaties, that the subjects of each party shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects to remove or remain. They are left free to choose for themselves; and, when they have made their election, may claim the right of enjoying it, under the treaty. But until the election is made, their former character continues unchanged. Until this election is made, if the claimant's property found upon the high seas, engaged in the commerce of his adopted country, should be permitted by the cruisers of the other belligerent to pass free, under a notion that he may elect to remove upon notice of the war, and should arrive safe; what is to be done, in case the owner of it should elect to remain where he is? For if captured, and brought immediately to adjudication, it must, upon this doctrine, be acquitted, until the election to remain is made and known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all and can lose nothing. If he, after the capture, should find it for his interest to remain where he is domiciled, his property, embarked before his election was made, is safe; and if he finds it best to return, it is safe, of course. It is safe, whether he goes or stays. This doctrine producing such contradictory consequences was not only unsupported by any authority, but would violate principles long and well established in the Prize Courts of England, and which ought not, without strong reasons which may render them inapplicable to America, to be disregarded by the Court. The rule there was, that the character of property during war cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule indeed went further; [417] as to the correctness of which, in its greatest extension, no judgment needed then to be given; but it might safely be affirmed, that the change could not and ought not to be effected by an election of the owner and shipper, made subsequent to the capture, and more especially after a knowledge of the capture is obtained by the owner. Observe the consequences. The capture is made and known. The owner is allowed to deliberate whether it is his intention to remain a subject of his adopted or of his native country. If the capture be made by the former, then he elects to become a subject of that country; if by the latter, then a subject of that. Could such a privileged situation be tolerated by either belligerent? Could any system of law be correct which places an individual, who adheres to one belligerent, and, down to the period of his election to remove, contributes to increase her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral, as to both belligerents? This notion about a temporary

state of neutrality, impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, was altogether a novel theory, and seemed, from the course of the argument, to owe its origin to a supposed hardship, to which the contrary doctrine exposes him. But if the reasoning employed on the subject was correct, no such hardship could exist; for if, before the election is made, his property on the ocean is liable to capture by the cruisers of his native and deserted country, it is not only free from capture by those of his adopted country, but is under its protection. The privilege is supposed to be equal to the disadvantage, and is, therefore, just. The double privilege claimed seems too unreasonable to be granted.^(a)¹⁶⁰

[418] § 333. The national character of merchants residing in Europe and America is derived from that of the country in which they reside. In the eastern parts of the world, European persons, trading under the shelter and protection of the factories founded there, take their national character from that association under which they live and carry on their trade: this distinction arises from the nature and habits of the countries. In the western part of the world, alien merchants mix in the society of the natives; access and intermixture are permitted, and they become incorporated to nearly the full extent. But in the East, from almost the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the nation; they continue strangers and sojourners, as all their fathers were. Thus, with respect to establishments in Turkey, the British courts of prize, during war with Holland, determined that a

Merchants
residing in
the East.

(a) The *Venus*, Cranch, viii. 277. The *Mary and Susan*, Wheaton's Rep. i. 54. *United States v. Guillem*, Howard, xi. 60.

^[160] In the civil war in the United States, property was condemned on the ground of domicile only. It was decided, *first*, that if a place was in the firm possession and under the control of the rebel enemies, it was, for the time, and in the technical sense of the prize law, enemy's territory; *second*, that the property of a person domiciled in that place at the time of capture was liable to condemnation as enemy's property, in the sense of the prize courts; and, *lastly*, that although the owner was a citizen of the United States, and had always resided in that place, which was held to be of right a part of the United States, and of right a proper place of residence to constitute citizenship of the United States, yet the property of such a person was to be condemned without inquiring whether he was or was not, in his intentions or acts, loyal or disloyal. No offer was made, in these cases, to prove an attempt to change [418] domicile, and remove beyond the reach of the enemy's control, before the capture. In short, the rule of international war as to the domicile in the enemy's country was applied to citizens in the civil war. (The Prize Causes,^[1] Black's Rep. ii. 635; Amy Warwick, Sprague's Decisions, ii.; and Law Reporter, xxiv. 335, 494.) The same rule was applied to the property of foreigners domiciled in such places.

The general doctrine, that, in a civil war, actual and firm possession, and not the rights or merits of the parties to the war, determines the character of the place for the time being, so far as the commercial relations of neutrals are concerned, was also asserted by the United States in its diplomatic relations with Peru. Opinion of Attorney-General Black, May 15, 1858; Mr. Cass to Mr. Clay, Nov. 26, 1858: Senate Ex. Doc. No. 69, 35th Cong.]—D.

[¹ For Causes read Cases.]—G.G.W.

merchant, carrying on trade at Smyrna, under the protection of the Dutch consul, was to be considered a Dutchman, and condemned his property as belonging to an enemy. And thus in China, and generally throughout the East, persons admitted into a factory are not known in their own peculiar national character: and not being permitted to assume the character of the country, are considered only in the character of that association or factory.

But these principles are considered not to be applicable to the vast territories occupied by the British in Hindostan; because, as Sir W. Scott observes, 'though the sovereignty of the Mogul is occasionally brought forward for the⁽ⁱ⁾ purposes of policy, it hardly exists otherwise than as a phantom: it is not applied in any way for the regulation of their⁽ⁱⁱ⁾ establishments. Great Britain⁽ⁱⁱⁱ⁾ exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty; and if the high and^(iv) empyrean [419] sovereignty of the Mogul is sometimes brought down from the clouds, as it were, for the⁽ⁱ⁾ purposes of policy, it by no means interferes with the^(v) actual authority which that^(vi) country, and the East India Company, a creature of that^(vi) country, exercise^(vii) there with full effect.^(viii) Merchants residing there are hence considered as British subjects.'^(ix)(a)

House of
trade in the
enemy's
country.

§ 334. In general, the national character of a person, as neutral or enemy, is determined by that of his domicile; but the property of a person may acquire a hostile character, independently of his national character, derived from personal residence. Thus the property of a house of trade established in the enemy's country is considered liable to capture and condemnation as prize. This rule does not apply to cases arising at the commencement of a war, in reference to persons who, during peace, had habitually carried on trade in the enemy's country, though not resident there, and are therefore entitled to time to withdraw from that commerce. But if a person enters into a house of trade in the enemy's country, or continues that connection during the war, he cannot protect himself by mere residence in a neutral country.(a)

Converse of
the rule.

§ 335. The converse of this rule of the British Prize Courts, which has also been adopted by those of America, is not extended to the case of a merchant residing in a hostile country, and having a share in a house of trade in a neutral country. Residence in a neutral country

(a) The Indian Chief, Robinson's Adm. Rep. iii. 12.

(a) Robinson's Adm. Rep. i. 1, The Vigilantia; ii. 255, The Susa; iii. 41, The Portland; v. 297, The Jonge Klassina. Wheaton's Rep. i. 159, The Antonia Johanna; iv. 105, The Freundschaft.

[¹ Delete the.]—G.G.W.

[ⁱⁱ For the regulation of their read the actual regulation of our.]—G.G.W.

[ⁱⁱⁱ For Great Britain read This country.]—G.G.W.

[^{iv} For and read or as I may almost say, this.]—G.G.W.

[^v For that read this.]—G.G.W.

[^{viii} Insert quotation mark after effect.]—G.G.W.

[^{ix} Omit quotation mark after subjects.]—G.G.W.

[^v For the read that.]—G.G.W.

[^{vii} For exercise read exercises.]—G.G.W.

will not protect his share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country. It is impossible not to see, in this want of reciprocity, strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adapted to encourage its naval exertions.^(a)¹⁶¹

[420] § 336. The produce of an enemy's colony, or other territory, is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or wherever may be his place of residence.

This rule of the British Prize Courts was adopted by the Supreme Court of the United States, during the late war with Great Britain, in the following case.⁽ⁱ⁾ The island of Santa Cruz, belonging to the King of Denmark, was subdued during the late European war by the arms of His Britannic Majesty. Adrian Benjamin Bentzon, an officer of the Danish government, and a proprietor of land in the island, withdrew from the island on its surrender, and had since resided in Denmark. The property of the inhabitants being secured to them by the capitulation, he still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of that estate, on board a British ship, and consigned to a commercial house in London, on account and risk of the owner. On her passage the vessel was captured by an American privateer, and brought in for adjudication. The sugars were condemned in the court below as prize of war, and the sentence of condemnation was affirmed on appeal by the Supreme Court.

§ 337. In pronouncing its judgment, it was stated by the Court, that some doubt had been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British

Produce of the enemy's territory considered as hostile, so long as it belongs to the owner of the soil, whatever may be his national character or personal domicile.

This rule adopted by the Supreme Court of the United States, in the case of the thirty hogsheads of sugar.

(a) Mr. Chief Justice Marshall, in *The Venus*, Cranch, viii. 253.

^[161] But there seems no sound reason for demanding the application to these cases of what is called reciprocity. Reciprocity implies two parties, who make some equitable exchange or offset of rights or benefits yielded or enjoyed. The cases stated in the text are rather those of two positions of a third party, each having an element [420] of hostile connection, presented conversely. In the one case, a stranger to the belligerents is a neutral, as far as his personal domicile is concerned, but has an active commercial interest involved with the enemy's interests, and subject to the enemy's control and taxation. In the other, his special commercial interest referred to is neutral, as far as its locality is concerned; but, by reason of his personal domicile, he is himself subject to the enemy's control, and liable to compulsory service, and to unlimited taxation and forced contributions, which may reach and include the profits of his commercial house in the neutral country. The decision of the one case in the affirmative carries with it no argument that the other should be decided in the negative. The two cases are independent. The question in each is, whether the element of hostile connection or control which it presents, is sufficient to warrant a belligerent in taking the property *jure belli*.—D.

[¹ Beginning with this sentence the text down to the bottom of page 424 is quoted, with slight verbal changes, from Marshall, C.J., *Thirty Hogsheads of Sugar*, 9 Cranch 191.]—G.G.W.

island. But for this doubt there could be no foundation. Although acquisitions, made during war, are not considered as permanent, until confirmed by treaty, yet to every commer[421]cial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.¹⁶²

The question was, whether the produce of a plantation in that island, shipped by the proprietor himself, who was a Dane residing in Denmark, must be considered as British, and therefore enemy's property.

In arguing this question the counsel for the claimants had made two points: 1. That the case did not come within the rule applicable to shipments from an enemy's country, even as laid down in the British Courts of Admiralty. 2. That the rule had not been rightly laid down in those courts, and consequently would not be adopted in those of the United States.

The Thirty
Hogsheads
of Sugar,
continued.
The British
cases ex-
amined.

[422] § 338. 1. Did the rule laid down in the British Courts of Admiralty embrace this case? It appeared to the Court that the case of *The Phoenix* was precisely in point. In that case a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the

[¹⁶² The Supreme Court of the United States decided that, while Castine, in Maine, was in the firm possession of the British forces, who had established a temporary military government over it, it was not a port of the United States, within the meaning of the revenue laws, in such manner that the United States could, after the evacuation of the place, compel a citizen to pay duties upon goods which he imported into it during the British occupation. (*United States v. Rice*, Wheaton's Rep. iv. 246.) During the Mexican war, certain ports of the country which were in the firm possession of the United States forces, were decided not to be ports of the United States, in such sense that the ordinary revenue laws established for the Union would take effect there; but were places held by the nation for a special purpose of war,—whether to be permanently held or not, being matter of future determination,—and subject, while so held, to such special revenue regulations as the proper department of the government should establish. In the absence of any provisions by Congress for such cases, the President, as commander-in-chief, had authority to prescribe them. As regards goods imported into the United States from a place so held, they are to be considered as importations from a foreign country. (*Fleming v. Page*, Howard, ix. 603. *Cross v. Harrison*, Howard, xvi. 164.)

The general doctrine may be stated thus: firm possession by the enemy in war suspends the power and right to exercise sovereignty over the occupied place, and gives the enemy certain rights over it, of a temporary character, which all nations recognize, and to which loyal citizens may submit. It is, for the time, in the sense of the laws of war, enemy's territory, and is to be treated as such in almost all supposable cases of belligerent or neutral rights and duties. (*United States v. Rice*, Wheaton's Rep. iv. 246. *Thirty Hogsheads of Sugar*, Cranch, ix. 191. *Fleming v. Page*, Howard, ix. 603. *Cross v. Harrison*, Howard, xvi. 164.) It was upon this principle that the courts of the United States, during the civil war, were able to treat portions of the United States, as enemy's territory, for the time being, in the technical sense of the laws of war, and the property of persons residing in it, captured at sea, as enemy's property, without touching the question of the general political *status* of such places and their inhabitants. See note 153, *ante*, on Belligerent Powers in Civil Wars; and note 169, *infra*, on Conquest and Belligerent Occupation.]—D.

produce of their estates in Surinam. The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimants did not controvert this position. They admitted it, but endeavored to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his judgment, Sir William Scott laid down the general rule thus: 'Certainly nothing can be more decided and fixed, as the principle of this court, and of the Supreme Court, upon very solemn argument there, than⁽ⁱ⁾ that the possession of the soil does impress upon the owner the character of the country, so⁽ⁱⁱ⁾ far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the Superior Court, that it is no longer open to discussion. No question can be made upon the point of law at this day.'^(a)

Afterwards, in the case of *The Vrow Anna Catharina*, Sir William Scott laid down the rule, and stated its reason. 'It cannot be doubted,' said he, 'that there are transactions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country in that particular transaction, independent of his own personal residence and occupation.'^(b)

It was contended that this rule, laid down with so much precision, did not embrace Mr. Bentzon's claim, because he had not 'incorporated himself with the permanent interests of the nation.' [423] He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

This distinction did not appear to the Court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general national character. The acquisition of land in Santa Cruz bound the claimant, so far as respects that land, to the fate of Santa Cruz, whatever its destiny might be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general national character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British. The general, com-

(a) *The Phoenix*, Robinson's Adm. Rep. v. 21.

(b) *The Vrow Anna Catharina*, Robinson's Adm. Rep. v. 167.

[ⁱ *Omit than.*—G.G.W.]

[ⁱⁱ *For so read*—G.G.W.]

mercial, or political character of Mr. Bentzon could not, according to this rule, affect that particular transaction. Although incorporated, so far as respects his general national character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was at that time British; and though, as a Dane, he was at war with Great Britain, and an enemy, yet as a proprietor of land in Santa Cruz, he was no enemy: he could ship his produce to Great Britain in perfect safety.

2. The case was, therefore, certainly within the rule as laid down by the British Prize Courts. The next inquiry was, how far that rule will be adopted in this country?

The Thirty
Hogsheads
of Sugar,
continued.
How far
the British
rule is
adopted in
the United
States.

§ 339. The law of nations is the great source from which we derive those rules respecting belligerent and neutral rights, which are recognized by all civilized and commercial States throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is [424] understood in that country, and will be considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British Prize Courts, and of those established in the courts of other nations, there were circumstances not to be excluded from consideration, which give to those rules a claim to our consideration that we cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it.

It would not be advanced in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided entirely on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in *The Phoenix* was said to be a recent rule, because a case solemnly decided before the Lords Commissioners, in

1783, is quoted in the margin as its authority. But that case was not suggested to have been determined contrary to former practice or former opinions. Nor did the Court perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, was an opinion which certainly prevailed very extensively. It was not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicil of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It was no extravagant perversion of principle, nor was it a violent offence to the course of human opinion to say, that the proprietor, so far as respects his interest in the land, partakes of its character, and that its produce, while the owner remains unchanged, is subject to the same disabilities.^(a)⁽¹⁾

[425] § 340. So, also, in general, and unless under special circumstances, the character of ships depends on the national character of the owner, as ascertained by his domicil; but if a vessel is navigating under the flag and pass of a foreign country, she is to be considered as bearing the national character of the country under whose flag she sails: she makes a part of its navigation, and is in every respect liable to be considered as a vessel of the country; for ships have a peculiar character impressed upon them by the special nature of their documents, and are always held to the character with which they are so invested, to the exclusion of any claims of interest which persons resident in neutral countries may actually have in them. But where the cargo is laden on board in time of peace, and documented as foreign property in the same manner with the ship, with the view of avoiding alien duties, the sailing under the foreign flag and pass is not held conclusive as to the cargo. A distinction is made between the ship, which is held bound by the character imposed upon it by the authority of the government from which all the documents issue, and the goods, whose character has no such dependence upon the authority of the State. In time of war a more strict principle may be necessary; but where the transaction takes place in peace, and without any expectation of war, the cargo ought not to be involved in the condemnation of the vessel, which, under these circumstances, is considered as incorporated into the navigation of that country whose flag and pass she bears.^(a)¹⁶³

National
character of
ships.

(a) *Thirty Hogsheads of Sugar*, Cranch, ix. 191-199.

(a) *Robinson's Adm. Rep.* i. 1, *The Vigilantia*; v. 161, *The Vrow Anna Catharina*. *Dodson's Adm. Rep.* i. 131, *The Success*.

[¹⁶³ This subject of flags and papers needs elucidation. Where a State has authority to

[¹ See footnote i, p. 353.]—G.G.W.

Sailing
under the
enemy's
license.

[426] § 341. We have already seen that no commercial intercourse can be lawfully carried on between the subjects of States at war with each other, except by the special permission of their respective governments. As such intercourse can only be legalized in the subjects of one belligerent State by a license from their own government, it is evident that the use of such a license from the enemy must be illegal, unless authorized by their own government; for it is the sovereign power of the State alone which is competent to act on the considerations of policy by which such an exception from the ordinary consequences of war must be controlled. And this principle is applicable not only to a license protecting a direct commercial intercourse with the enemy, but to a voyage to a country in alliance with the enemy, or even to a neutral port; for the very act of purchasing or procuring the license from the enemy is an intercourse with him prohibited by the laws of war: and even supposing it to be gratuitously issued, it must be for the special purpose of furthering the enemy's interests, by securing supplies necessary to prosecute the war, to which the subjects of the belligerent State have no right to lend their aid, by sailing under these documents of protection.^(a)¹⁶⁴

CHAPTER II

RIGHTS OF WAR AS BETWEEN ENEMIES

Rights of
war against
an enemy.

§ 342. In general it may be stated, that the rights of war, in respect to the enemy, are to be measured by the object of the war. Until that object is attained, the belligerent has, strictly speaking, a right to use every means necessary to accomplish the end for which he has taken

inquire into the national character of a merchant vessel apparently of another State, for any purpose, whether of war or peace, it cannot be bound by the flags or papers used. It can go behind the ostensible nationality indicated by these, and ascertain the actual nationality, which depends on the domicil of the owner and other facts. The State may, if it chooses, hold the ship concluded by the fact of having used the flags and papers she has knowingly carried, if that result is favorable to the interests of the State. This is usually done in war, and may be done in peace. It is simply the application to the inquiry of a rule of conclusive presumption or *estoppel* against a party. Whether it shall be enforced depends on State policy. The vessel cannot claim the application of the rule in its own favor. So, if it shall appear that the flags and papers of a certain nation are used by the permission of that nation in the particular case, giving to the vessel a spurious national character, that permission does not affect the right of the State making the inquiry, as between itself and the owner of the vessel, to go beyond the flags and papers and ascertain the actual nationality, and treat the vessel accordingly. If the nation which has granted the permission should interpose, the question is a political one between the two nations.]—D.

(a) Cranch's Rep. viii. 181, *The Julia*; Ibid. 203, *The Aurora*. Wheaton's Rep. ii. 143, *The Ariadne*; Ibid. iv. 100, *The Caledonia*.⁽¹⁾

^[164] See note 158, *ante*, *Intercourse with the Enemy*; and note 198, *infra*, *License to Trade with the Enemy*.]—D.

[¹ For *Caledonia* read *Caledonian*].—G.G.W.

up arms. We have already seen that the practice of the ancient world, and even the opinion of some modern writers on public law, made no distinction as to the means to be employed for this purpose. Even such insti[427]tutional writers as Bynkershoek and Wolf, who lived in the most learned and not least civilized countries of Europe, at the commencement of the eighteenth century, assert the broad principle, that every thing done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, and even poison, may be employed against him; and that an unlimited right is acquired by the victor to his person and property. Such, however, was not the sentiment and practice of enlightened Europe at the period when they wrote; since Grotius had long before inculcated milder and more humane principles; which Vattel subsequently enforced and illustrated, and which are adopted by the unanimous concurrence of all the public jurists of the present age.(a)¹⁶⁵

§ 343. The law of nature has not precisely determined how far an individual is allowed to make use of force, either to defend himself against an attempted injury, or to obtain reparation when refused by the aggressor, or to bring an offender to punishment. We can only collect from this law the general rule, that such use of force as is necessary for obtaining these ends is not forbidden. The same principle applies to the conduct of sovereign States, existing in a state of natural independence with respect to each other. No use of force is lawful, except so far as it is necessary. A belligerent has, therefore, no right to take away the lives of those subjects of the enemy whom he can subdue by any other means. Those who are actually in arms, and continue to resist, may be lawfully killed; but the inhabitants of the enemy's country who are not in arms, or who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war. Those ends may be accomplished by making prisoners of those who are taken in arms, or compelling them to give security that they will not bear arms against the victor for a limited period, or during the continuance of the war. The killing of prisoners can only be justifiable in those extreme cases where resistance on their part, or on the part of others who come to their rescue, renders it impossible to keep them. Both reason and gen[428]eral opinion concur in showing, that nothing but the strongest necessity will justify such an act.(a)¹⁶⁶

Limits to
the rights of
war against
the person
of an enemy.

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 1. Wolfius, Jus Gent. 878. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 4, §§ 5-7. Vattel, Droit des Gens, liv. iii. ch. 8.

[¹⁶⁵ Note 166, *infra*, Usages of War.]—D.

(a) Rutherford's Inst. b. ii. ch. 9, § 15.

[¹⁶⁶ *Usages of War*.—This subject has been fully treated by Professor Bernard, in an essay on the Growth and Usages of War, in the Oxford Essays of 1856. The history of the changes in the laws of war has been discussed by Mr. Wheaton, in his History of the Law of Nations,

Exchange
of prisoners
of war.

[429] § 344. According to the law of war, as still practised by savage nations, prisoners taken in war are put to death. Among the

760; and by Mr. Senior, in the *Edinburgh Review*, lxxii.⁽¹⁾ See also Halleck's *Intern. Law*, 425-445; Woolsey's *Introd.* §§ 125-135; Ward's *Hist.* ch. 9, 15; and the Instructions for the Government of the Armies of the United States, drawn by Dr. Francis Lieber, and adopted by the Secretary of War, in General Order No. 100, April 24, 1863. Dr. Bluntschli, of Heidelberg, has just issued, too late for notice in this work, the first part of a treatise on the Modern Laws of War. The subject is best treated under several heads.

(I.) *Weapons of War and other Means of Destruction.* Nations seem to concur in denouncing the use of poisoned weapons, the poisoning of springs or food, and the introduction of infectious or contagious diseases. As to the nature of weapons not poisoned, there is, and perhaps can be, no rule. Concealed modes of extensive destruction are allowed, as torpedoes to blow up ships, or strewed over the ground before an advancing foe, and mines; nor is the destructiveness of a weapon any objection to its use. Hot shot is permitted, and bombshells, to set fire to a vessel or camps or forts; but it is not thought justifiable to use chemical compounds which may maim or torture the enemy. It seems to be thought that a steam-vessel, on the defensive, may throw her steam or boiling water upon boarders. Assassination is prohibited. As war will avail itself of science in all departments, for offence and defence, perhaps the only test, in case of open contests between acknowledged combatants is, that the material shall not owe its efficacy, or the fear it may inspire, to a distinct quality of producing pain, or of causing or increasing the chances of death to individuals, or spreading death or disability, if this quality is something else than the application of direct force, and of a kind that cannot be met by countervailing force, or remedied by the usual medical and surgical applications for forcible injuries, or averted by retreat or surrender. Starving a belligerent force, by cutting off food or water, is also lawful; for that may be so averted.

(II.) *Employment of Savage Allies.* The employment, though open and acknowledged, of savage allies who do not recognize the laws of war and of nations, against a civilized enemy, is discountenanced by the best jurists and statesmen of modern times. It is not a valid objection that individual soldiers are of a barbarian race or pagan religion, when they are subjected to the articles of war, and under the responsible command of officers of a civilized nation.

(III.) *Desertion and Violation of Parole.* The penalty for desertion is not avoided by the deserter having joined the enemy's service and been taken prisoner in battle. Combatants become prisoners of war, and, when they cease to resist, are to be treated with humanity, and to have medical aid and care; but such force may be used as is necessary to secure them from escaping. Its measure is the necessity, under the circumstances of each case. There is no positive obligation to exchange prisoners; but the nation whose refusal prevents the exchange ought to provide for the support of its own soldiers who are prisoners. It has been held that the recaptured prisoner who has violated parole may be punished by death. (Martens, tom. ii. § 275.) This is laid down in the Instructions to the Armies of the United States of April 24, 1863, § 124. Still, the modern practice usually is to abstain from the infliction of death, except in [429] an aggravated case, and to substitute strict confinement, with severities and privations not cruel in their nature or degree. For a history of the changes in the mode of treatment of prisoners from the earliest to modern days, see Woolsey, § 128.

(IV.) *Obstruction of Harbors.* Parties defending a city often obstruct the approaches to it by driving piles or sinking loaded vessels in the channels. The attacking party in the possession of the approaches will often do the same, to prevent ingress and egress of hostile vessels. At the close of the war, these obstructions yield to engineering. During the war of the Revolution, the British closed, in this manner, the harbor of Savannah. There have been many such cases in European warfare; and, during the late civil war in the United States, the rebel authorities placed obstructions in many harbors, which it has since been found very difficult to remove. But the right to use these means of warfare cannot be questioned. The entire destruction of a harbor long used by the commercial world, not as a means of belligerent coercion, but as mere vindictive punishment, would doubtless furnish a proper occasion for remonstrance by neutral powers. While Charleston was besieged and blockaded, in 1861-2, the national fleet sank hulls loaded with stone, in some of the numerous approaches to that

[¹ For lxxii read lxxvii.]—G.G.W.

more polished nations of antiquity, this practice gradually gave way to that of making slaves of them. For this, again, [430] was substituted that of ransoming, which continued through the feudal wars of the Middle Age. The present usage of exchanging prisoners was not firmly established in Europe until some time in the course of the seventeenth century. Even now, this usage is not obligatory among nations who choose to insist upon a ransom for the prisoners taken by them, or to leave their own countrymen in the enemy's hands until the termination of the war. Cartels for the mutual exchange of prisoners of war are regulated by special convention between the belligerent States, according to their respective interests and views of policy. Sometimes prisoners of war are permitted, by capitulation, to return to their own country, upon condition not to serve again during the war, or until duly exchanged; and officers are frequently released upon their parole, subject to the same condition. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes. By the modern usage of nations, commissaries are permitted to reside in the respective belligerent countries, to negotiate and carry into effect the arrangements necessary for this object. Breach of good faith in these transactions can be punished only by withholding from the party guilty of such violation the advantages stipulated by the cartel;

city, leaving, however, two ship-channels open. These were purely military operations in aid of the blockade, and the port itself was claimed as the lawful territory of the attacking party. Under these circumstances, an extraordinary correspondence on the subject was opened by Lord Russell. In a letter to Lord Lyons, on the 20th December, 1861, he desired him to remonstrate with Mr. Seward against this act as 'a cruel plan, seeming to imply despair of the restoration of the Union, . . . a plan which could only be adopted as a measure of revenge and of irremediable injury against an enemy.' He was further instructed to say to Mr. Seward, 'that, even as a scheme of embittered and sanguinary war, such a measure would not be justifiable. It would be a plot against the commerce of all maritime nations, and against the free intercourse of the Southern States of America with the civilized world.'¹ (Earl Russell to Lord Lyons, Dec. 20, 1861. Same, to the Liverpool ship-owners, Jan. 15, 1862.) Whether or not Lord Lyons, in his conversation with Mr. Seward, repeated any of this ill-judged and intemperate language, no notice of it was taken by Mr. Seward, as far as appears by Lord Lyons's report to Earl Russell of Jan. 14, 1862. In that report, he simply represents Mr. Seward as referring to the limited and temporary character of the obstructions, and as remarking that 'he was not prepared to say, that, as an operation of¹¹ war, it was unjustifiable to destroy permanently the harbors of the enemy; but nothing of the kind had been done on the present occasion.' Mr. Seward seems also to have reminded Lord Lyons of the course of Great Britain at Savannah, and of the acts of the rebels in several of their ports; and that, since the sinking of the vessels, British steamers, loaded with munitions of war for the rebels, had succeeded in getting in. In a letter to Mr. Adams of Feb. 17, 1862, Mr. Seward writes, 'I am not prepared to recognize the right of other nations to object to the measure of placing artificial obstructions in the channels of rivers leading to ports which have been seized by the insurgents in their attempt to overthrow this government. I am, nevertheless, desirous that the exaggerations on that subject which have been indulged abroad may be corrected.' As might be supposed, the subject was not renewed by Great Britain.]-D.

[¹ This is a statement in regard to but not a quotation from the letter.]-G.G.W.

[¹¹ For of read in.]-G.G.W.

or, in cases which may be supposed to warrant such a resort, by reprisals or vindictive retaliation.^(a)¹⁶⁷

Persons
exempt from
acts of hos-
tility.

§ 345. All the members of the enemy State may lawfully be treated as enemies in a public war; but it does not therefore follow, that all these enemies may be lawfully treated alike; though we may lawfully destroy some of them, it does not therefore follow, that we may lawfully destroy all. For the general rule, derived from the natural law, is still the same, [431] that no use of force against an enemy is lawful, unless it is necessary to accomplish the purposes of war. The custom of civilized nations, founded upon this principle, has therefore exempted the persons of the sovereign and his family, the members of the civil government, women and children, cultivators of the earth, artisans, laborers, merchants, men of science and letters, and, generally, all other public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity.^(a)¹⁶⁸

Enemy's
property,
how far
subject to
capture and
confiscation.

§ 346. The application of the same principle has also limited and restrained the operations of war against the territory and other pro-

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 7, §§ 8, 9; cap. 11, §§ 9-13. Vattel, Droit des Gens, liv. iii. ch. 8, § 153. Robinson's Adm. Rep. vol. iii. note, Appendix A. Correspondence between M. Otto, French Commissary of Prisoners in England, and the British Transport Board, 1801. Annual Register, xlv.⁽¹⁾ 265: State Papers. Wheaton's Hist. Law of Nations, 162-164.

^[167] Halleck's Intern. Law, 430-433, 666-669. In the Instructions to the United States Armies of April 24, 1863, § 14,⁽¹¹⁾ it is declared, that, 'if it be discovered and fairly proved that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy;' yet great caution is enjoined in convictions of that description, on account of the great utility of flags of truce, and the good faith to be observed towards, as well as by, their bearers.]—D.

(a) Rutherford's Inst. b. ii. ch. 9, § 15. Vattel, Droit des Gens, liv. iii. ch. 8, §§ 145-147, 159. Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. 2, sect. 2, ch. 1, §§ 245-247.

^[168] In many treaties and decrees, fishermen catching fish as an article of food are added to the class of persons whose occupation is not to be disturbed in war. If non-combatants—i.e., persons not in military service—make forcible resistance, or violate the mild rules of modern warfare, give military information to their friends, or obstruct the forces in possession, they are liable to be treated as combatants; and, although none of these acts be done, non-combatants, in a particular place, under special circumstances, may be disarmed, required to give security for their peaceful conduct, or be held as prisoners, as where there is reason to doubt their inaction, and the situation of the forces in possession is precarious. (Halleck's Intern. Law, 427, 428.) The Instructions to the Armies of the United States (*supra*, note 166) include among persons liable to be treated as prisoners of war 'all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency, and promote directly the objects of the war, . . . citizens who accompany an army for whatever purpose, such as sutlers, editors or reporters of journals, and contractors;' and so, if captured on belligerent ground, and if unfurnished with a safe-conduct from their captor's government, 'the monarch and members of the hostile reigning⁽¹¹¹⁾ family, male or female; the chief and chief officers of the hostile government; and all persons who are of particular and singular use and benefit to the hostile army or its government.']—D.

^[1] For xlv read xliii.]—G.G.W.

^[111] For hostile reigning read reigning hostile.]—G.G.W.

^[11] For § 14 read § 114.]—G.G.W.

perty of the enemy. From the moment one State is at war with another, it has, on general principles, a right to seize on all the enemy's property, of whatsoever kind and wheresoever found, and to appropriate the property thus taken to its own use, or to that of the captors. By the ancient law of nations, even what were called *res sacræ* were not exempt from capture and confiscation. Cicero has conveyed this idea in his expressive metaphorical language, in the Fourth Oration against Verres, where he says that 'Victory made all the *sacred* things of the Syracusans *profane*.' But by the modern [432] usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war. Private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption extends even to the case of an absolute and unqualified conquest of the enemy's country. In ancient times, both the movable and immovable property of the vanquished passed to the conqueror. Such was the Roman law of war, often asserted with unrelenting severity; and such was the fate of the Roman provinces subdued by the northern barbarians, on the decline and fall of the western empire. A large portion, from one third to two thirds, of the lands belonging to the vanquished provincials, was confiscated and partitioned among their conquerors. The last example in Europe of such a conquest was that of England, by William of Normandy. Since that period, among the civilized nations of Christendom, conquest, even when confirmed by a treaty of peace, has been followed by no general or partial transmutation of landed property. The property belonging to the government of the vanquished nation passes to the victorious State, which also takes the place of the former sovereign, in respect to the eminent domain. In other respects, private rights are unaffected by conquest.(a)¹⁶⁹

(a) Vattel, Droit des Gens, liv. iii. ch. 9, § 13.⁽¹⁾ Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. 2, sect. 2, ch. 1, §§ 250-253. Martens, Précis, &c., liv. iii.⁽¹¹⁾ ch. 4, §§ 279-282.

¹⁶⁹ *Conquest and Belligerent Occupation*.—It was not the purpose of the author to treat largely of the laws of war. Consequently his work is not full on the subject of the rights of a conqueror in case of belligerent occupation (*occupatio bellica*), or of completed conquest (*debellatio, ultima victoria*), as respects immovable property, movables, incorporeal rights, and obligations. This subject has received a full treatment in the work of Pfeiffer (B. W.), *Das Recht der Kriegseroberung in Beziehung auf Staatscapitalien*, Cassel, 1823.

Pfeiffer discusses the subject in the scholastic manner of the continental publicists, and with constant reference to the technical terms of the Roman law. His views may be stated in substance thus: War-capture (*occupatio bellica*) is, by the showing of all the authorities, only a species of the *occupatio* of the Roman law, and follows the same rules; viz., there must be

[¹ For § 13 read § 163.]—G.G.W.

[¹¹ For iii read viii.]—G.G.W.

Ravaging
the enemy's
territory,
when lawful?

[433] § 347. The exceptions to these general mitigations of the extreme rights of war, considered as a contest of force, all grow out of

literal corporeal *apprehensio*, the taking possession of an unowned object (*res nullius*), which, in order to such kind of possession, must itself be corporeal. The requisite of *res nullius* is satisfied by the rule, that an enemy has no *jus commercii*, and consequently no capacity of ownership. His effects become those [433] of the first occupant. The author affirms this to be the undoubted law of modern as well as of former times.

As to the requisite of a corporeal thing, an extension, in analogy with the Roman private law, has been allowed to such incorporeal rights (*jura in re*) as are appurtenant and accessory to a corporeal object; *e.g.*, a servitude belonging to a landed estate is held to be occupied together with the dominant estate, as appurtenant to it. But personal servitudes (*i.e.*, belonging to persons), and, above all, obligations (*choses in action*), are incapable of occupation; and, by mere capture and conquest, no title in them is acquired.

In treating the effect of belligerent occupation of immovables, Pfeiffer's language is not free from incongruities. He sometimes admits in terms a provisional or revocable property dependent upon the terms of the peace; but his final, *ex professo* result is, that, until relinquishment by the original owner, neither the captor nor his grantee has any proprietary title, nor even a defensible and precarious one; and, eventually, he even gives this as the general rule, to which movables are an exception. (pp. 71, 73.) As to obligations (the creditor's interest in *choses in action*), capture and conquest *per se* create no right of ownership; and the legal relation of creditor can only be obtained by succession into the *status* and rights of the creditor. In case of a private person, this could be done *in invitum* only by reducing the creditor to slavery, when the master would succeed to his rights.

But, on the point of effecting a succession to the sovereign or State, as a result of capture or conquest, and, in virtue of such successorship, becoming substituted as the proper creditor in the public securities, Pfeiffer holds, 1st, That, so long as the war continues, there can be no such succession. 2d, The treaty concluding the war will generally settle this question in practice, if thereby, or in some other way, the previous sovereign cedes his right, or merely renounces it, leaving the power in the hands of the conqueror. 3d, If this do not occur, then the substitution in fact of the new power for the old; the cessation of any substantial resistance on the part of the people; practical general acquiescence in the relation of subjects, together with their being treated as such, and no longer as public enemies, by the conqueror,—this state of things will suffice to create him successor to the former ruler, and consequently to all his right and interest in the public assets.

But, though occupation merely gives the conqueror no legal right to play the part of creditor in the public securities, yet, in consequence of the military duress which he may exercise over the debtors, they will be allowed subsequently the benefit of certain payments to him which were *bonâ fide* compulsory. Thus, if, by direct forcible levy on their property, or by a command attended with penal consequences, he collects amounts actually due by the terms of the obligation, this will be regarded as an *occupatio* by him of the effects of the enemy State in their hands. This is a relaxation from the strict rule of law; for, a money-debt being payable *in genere*, the debtor is not strictly released by any act or casualty that does not exhaust the *genus*. The theory, that it is an *occupatio* of the property of the hostile sovereign in the debtor's hands, is resorted to for the sake of equity. But, to obtain the benefit of this modification in the debtor's favor, it is requisite that the amount shall be already due. Yet, if it be overdue, and that by the debtor's fault, so that by reason of his delay the conqueror has had the opportunity to carry off the payment due to the proper creditor, then the debtor will not be allowed the benefit of his payment. It may be [434] suggested, that, if the debtor is compelled to anticipate the pay-day, his hardship is greater, and he would seem entitled to the same equity as where he pays or compounds a debt due; but the above theory, resorted to in his favor, will not bear so great an extension.

Again, the paying debtor must be under the military power of the conqueror; and payment by a non-resident debtor will not be credited to him, as the element of duress would be insufficient. There must be actual payment: acquittances without payment will not avail. If, to avoid forcible levy, the debtor compromises, or avails himself of a general proviso in the order for collection, by paying a portion of the debt for the whole, he will be allowed the benefit of his actual payment, as an expense incurred to preserve the whole debt from *occupatio*,

the same original principle of natural law, which authorizes us to use against an enemy such a de[434]gree of violence, and such only, as may

whereby it would have been lost to the original creditor, of whom he is regarded in this transaction as *negotiorum gestor*.

The entire subject of the rights of the conqueror, whether by virtue of mere belligerent occupation, or of completed conquest, and with reference to movables and immovables, corporeal and incorporeal rights, is treated with great fulness by Halleck, in that portion of his work on International Law which relates to the Laws of War. Most writers on international law treat this subject, but less fully than Halleck, with whom the laws of war are the leading object. Heffter, *Europ. Völker*. §§ 124, 131-134, 185. Puffendorf, *de Jure Nat. et Gent. lib. viii. ch. 6*. Vattel, *liv. iii. ch. 5, 8, 13, 14*. Bouvier's *Law Dictionary*, verb. 'conquest.' Grotius, *de Jur. Bel. ac Pac. lib. ii. ch. 22*. Wildman's *Intern. Law*, i. 163 *et seq.* Phillimore's *Intern. Law*, iii. 157, 158, §§ 545-556.

The summary of the positions taken by these writers, on the several departments of this subject, may be stated thus:—

IN CASE OF COMPLETED CONQUEST. Completed conquest supposes the conquering power to have become the permanently established sovereignty of the country. This may be either by a cession from the former sovereign, or by a practical acquiescence by him or by the people of the territory in its subjection to the conquering State, or by the entire extinction of the political existence of the conquered State.

(1) *Private Property of Citizens*. When this change has taken place, it is to be observed that the relations of war give place to those of peace, and military authority to civil administration. There is no reason, therefore, why the State should confiscate the property of its new subjects any more than of its old subjects; for the fact, that they were formerly enemies, is not a crime or a penal offence. Nations now respect the obligation of a citizen or subject to sustain his own State in war, and he is treated by the opposite belligerent as a prisoner of war,—in other words, as a lawful belligerent, and not as a criminal. (This reasoning does not apply to enemies in a civil war which has its origin in rebellion; for that is, in law, a criminal offence.) It follows, therefore, that the private property of citizens is not considered as transferred by the completed conquest to the conquering State. It is a distinct question, how far the completed conquest affects acts of ownership done by the conquering State while in hostile military occupation. Not only does the State, now become the sovereign, respect private rights and titles, but is bound to make laws and regulations to insure to individuals the means of exercising and enjoying their rights, appropriate to the new political system under which they have passed.

(2) *The Political Laws of the Former State*. Political laws and systems imply a reciprocal relation between citizens and the body politic. By the completed conquest, [435] the former body politic has ceased to exist. Consequently, the former political system disappears, and a new one takes its place. And the new political system is established and regulated by its own force and on its own principles. The political and civil rights of the inhabitants of the country depend on the provisions of the new system, in the absence of treaty stipulations on the subject.

(3) *Allegiance to the Conquering State*. In the absence of any treaty stipulations on this point, it is considered that the citizens of the conquered country owe absolute allegiance to the new State. If it is a bare case of conquest, the conqueror, now become the permanent sovereign, can surely forbid the departure of former citizens from the country, and claim sovereign rights over them. In the case of a title resting solely on cession, it is understood that the former citizens have the option to stay or leave the country, and the continuance of their domicile is conclusive on the obligation of permanent allegiance.

(4) *Municipal Private Laws*. The reasons for considering the former political laws as abrogated do not apply to the municipal laws, which regulate the private relations of individuals to each other, and their private rights of property. The change of sovereignty does not obliterate the subject-matters of property or obligations, nor the parties to the rights, duties, or compacts; and, in respect to these things, there is a permanent necessity for an uninterrupted existence of laws of some kind. Accordingly, it is held that the municipal private code remains in force. Yet it is not *proprio vigore*, or by the will of the people of the conquered country, but by the acquiescence of the new sovereignty, which is held to intend the continuance of such laws in the absence of new laws displacing them.

(5) *Property of the Conquered State*. The conqueror succeeds to the public property of

be necessary to secure the object of hostilities. The same general rule, which determines how far it is lawful to destroy the persons of enemies,

the conquered State, of whatever character, whether movable or immovable, corporeal or incorporeal, lying in possession or in right of action. It can, of course, give valid titles to it, and valid acquittances to debtors of the former State; and the debtors are bound to pay their debts to the new State, as the successor and representative of the old. The notorious case of the refusal of the Elector of Hesse Cassel to recognize the sale of crown-lands made by the King of Westphalia, was a violation of this principle. His State was conquered by Napoleon in 1806, who made a completed conquest of it, and incorporated it into the Kingdom of Westphalia, which was recognized as a sovereignty by the treaties of Tilsit and Schönbrunn, and by the public law of Europe, for not less than seven years. When the Elector was restored to his throne by the treaty of Vienna, he retook possession of the former crown-lands, which his own subjects had bought of the King of Westphalia, and refused to recognize their titles, or to make them any pecuniary allowance. He refused to permit his courts to pass upon the question, or to leave it to arbitration; and the injured parties did not succeed in getting either the parties to the treaty of Vienna, or the Germanic Confederation, to interfere for their redress. The course of the Elector has been condemned by publicists.

Heffter, *Europ. Völker*. §§ 185, 186; Rotteck und Welcker's *Staats-Lexikon* (Domainen-käufer); Schweckart's *Napoleon und die Kurhess. Capitalschuldner*. Phillimore's *Intern. Law*, iii. §§ 573, 574. Halleck's *Intern. Law*, 840, 841.

The Elector of Hesse Cassel also refused to respect the payments made by the public debtors to the King of Westphalia. The case of the Count Von Hahn, which was carried through several tribunals, was a fair test of the principle. Count Von [436] Hahn, a resident of the Duchy of Mecklenburg, compounded with the King of Westphalia for the debt he owed to Hesse Cassel, and obtained a release; and the Duchy of Mecklenburg declared the mortgage upon the count's estate, given to secure that debt, to be cancelled and void. On his restoration, the Elector instituted proceedings as a creditor against the estate. The first two tribunals—the Law Faculties of Breslau and Kiel—decided that the Elector could recover so much of the debt as the count had not actually paid. This was upon the theory that the possession of the King of Westphalia was a military occupation, as of a transient conqueror. The final tribunal decided that the debt was validly cancelled, on the ground that the King of Westphalia had become the permanent and recognized sovereign of Hesse Cassel, and that the return of the Elector could not be considered as a continuance of his former sovereignty in such a sense as to invalidate the sovereign acts of the King of Westphalia in dealing with the public debts. Heffter's *Europ. Völker*. §§ 186–188. Pfeiffer's *Kriegserob. ut supr.* Phillimore's *Intern. Law*, iii. §§ 568–572. Halleck's *Intern. Law*, 842. Rotteck und Welcker's *Staats-Lexikon*, tit. Domainen-käufer. Schweckart's *Napoleon und die Kurhess. Capitalschuldner*. *Conversations-Lexikon*, iii. Domainen.

(6) *Retroactive Effect*. The completed conquest operates to confirm and complete the rights and titles which the conquering power may have given, by virtue of previous belligerent occupation, to the public property of the conquered State. Such titles, being given as and for absolute titles, yet, in their nature, subject to the chances and final results of the war, take their date, after the complete conquest, from the original grant. As to the alienations of public property by virtue of belligerent occupation, *vide infra*.

BELLIGERENT OCCUPATION. Belligerent occupation implies a firm possession, so that the occupying power can execute its will either by force or by acquiescence of the people, and for an indefinite future, subject only to the chances of war. On the other hand, it implies that the status of war continues between the countries, whether fighting has ceased or not, and that the occupying power has not become the permanent civil sovereign of the country. The effect of such occupation may be considered under several heads:—

(1) *Allegiance and Political Laws*. As the State has not been able to protect its citizens, its claim upon their allegiance is suspended during hostile occupation. They not only cannot be afterwards punished for having acquiesced in the authority that has gained control over the place, but they cannot be compelled to pay to their government, after restoration, taxes or excise or customs duties for the time the place was in the enemy's possession. (*United States v. Rice* (the *Castine Case*), *Wheaton's Rep.* iv. 246. *Fleming v. Page*, *Howard*, ix. 663.)⁽¹⁾

[¹ *For 663 read 603*]—G.G.W.

will serve as a guide in judging how far it is lawful to ravage or lay waste [435] their country. If this be necessary, in order to accomplish

Cross v. Harrison, Howard, xvi. 164.) The people of the conquered place who submit to the conqueror and remain, as non-combatants, owe a temporary and qualified allegiance to the occupying power. The commander of the occupying forces has a right to require of the inhabitants an oath or parole, not inconsistent with their general and ultimate allegiance to their own State. He may require of them an oath or promise to remain quiet, and make no attempt to disturb his authority, and to submit to such laws as shall be made for the government of the place. He may require them to do police service, but not to take arms against their own country. Indeed, in the absence of any such formal promise, it is understood in modern times, that, by taking the attitude of non-combatants and submitting to the authority, the citizen holds himself out as one not requiring restraint, and is treated as having given an implied parole to that effect. Combatants, [437] or persons who, by resistance, or attempts at resistance, or by refusal to submit to the authority, take the attitude of combatants, may be placed under restraint as prisoners of war. Modern writers have gone so far as to contend, that citizens, who come under this temporary and partial allegiance to the conqueror, cannot throw it off and resist the authority by force, except on grounds analogous to those which justify revolution. If the occupying power does not do its part to protect the citizen in his person or property, or makes unreasonable and tyrannical exactions, these may constitute, as in a case of revolution, ethical justification for a resort to stratagem or force to overthrow the government.

Whether the laws which the occupying power establishes over a conquered place are those of the conquering country, or such other and different laws as that power shall choose to establish, is a matter of internal and not of international law. Under the Constitution of the United States, a place so held is not a State of the Union, and the general laws of the Union do not, *proprio vigore*, extend over it; but it is simply a district held by the military power, for the belligerent purposes of the Union, and is subject to such laws as the belligerent authorities of the Union may establish. Congress is considered as having a general authority to make laws for the government of such places, under its authority over martial and military law; and, in the absence of Acts of Congress, the President, as commander-in-chief, establishes such rules as he sees fit. (Halleck's Intern. Law, 784-6. Fleming v. Page, How. ix. 615. Cross v. Harrison, How. xvi. 164.) Importations into the United States from such places are held to be foreign and not domestic trade, within the meaning of the revenue laws. By the British system, on the other hand, it is said that a conquered place becomes, *ipso facto*, a part of the king's domain, and its inhabitants become in all respects his subjects. (Calvin's Case, Coke's Rep. Part VII. Elphinstone v. Bedreechund, Knapp, 338. Campbell v. Hall, State Trials, xxiii. 322. Same, Cowper, i. 205. Fabrigas v. Mostyn, Cowper, i. 165. Collet v. Keith, East. ii. 260. Blanchard v. Guldry,¹ Mod. Rep. iv. 225.) Still, it is not to be supposed that the citizens of such a place are citizens of England, Scotland, or Ireland, or have political privileges as such, as a right to vote, or to be represented in Parliament. Foreign nations must accept the *de facto* condition of the place, and comply with such commercial and police regulations, and pay such duties, as the occupying power shall establish, if they choose to trade there; and treaty rights bearing on those subjects, whether made with the conquering or the conquered State, are inapplicable.

(2) *The Extent of the Belligerent Occupation.* The authority of the conqueror extends no further than his actual power extends. Such persons, such things, and such districts of country, as are under his hand and submit to his authority, or are coerced by it, are subject to his laws. His title rests on force, and is measured by it.

(3) *Municipal and Private Laws.* In case of belligerent occupation, as in case of completed conquest, the private laws of the former State subsist, unless they are suspended by the act of the occupying power, and for the same reason,—that some laws must exist, to regulate private rights and relations, and the persons and things which are their subjects remain unchanged: therefore the laws are permitted to continue until a change is expressly made.

(4) *Immovable Property.* By belligerent occupation, the conqueror has the right to appropriate the use of public lands, and of all incorporeal rights accessory to them. He may confiscate the rents and taxes due, and use these lands in such way as he sees [438] fit. But, as his occupation is subject to the chances of war, so is his title to what he cannot remove and

[¹ For Blanchard v. Guldry read Blankard v. Galdy.]—G.G.W.

the just ends of war, it may be lawfully done, but not otherwise. Thus, if the progress of an enemy cannot be stopped, nor our [436] own

corporeally make his own. He cannot, therefore, give to another a permanent title to public lands. Whoever takes a title from the occupier, takes it subject to the results of the war. If the title is, on its face, complete and permanent, and the war results in a completed and recognized sovereignty of the grantor, the title of the alienee is confirmed, and takes its date from the original grant. As to who may take grants from the belligerent occupier, it is to be observed, that, if a subject of the late sovereign purchases a title, he may be treated by his sovereign as dealing with the enemy, and supplying him with means. Indeed, the purchase is inconsistent with his allegiance. If a neutral private citizen buys a title, he takes it subject to the results of the war. If a neutral State takes a title, the act is considered as so far an abandonment of neutrality. It is an attempt to place the contingent property of one belligerent State out of the reach of the chances of war; and the neutral State cannot assert its title against the original sovereign, if he regain possession, except as a hostile act. (Halleck's Intern. Law, 449-451. Vattel, liv. iii. ch. 13, § 198. Kent's Comm. i. 110.) In like manner, a sale of his public lands by the excluded sovereign, while they are under hostile occupation, is only a transfer of his chance of regaining them; and a sale made by him in view of a probable loss of his territory, to defeat the rights of the probable conqueror, may be regarded as a mere stratagem of war, and not as a *bonâ fide* transfer. As to private property in immovables, the occupying power is not considered, in the modern practice of nations, as authorized to confiscate their use and income. He may make such use of them as the necessities of war require, and subject them to taxes and contributions; but the mere fact of military occupation does not work a transfer of the uses or income of private lands, or authorize such a transfer to be, in fact, made.

(5) *Public Movable Property*. It is the tendency of States, in all systems of government, to treat the transfer of corporeal movable property,—what the Common Law calls *chattels*,—as far as possible, as giving the full title to the possessor. The simple and severe rules of war take the same direction. The belligerent occupant is treated as acquiring a complete title to all corporeal movables of the hostile State which come under his actual control. He may, by leaving them behind him, and by their coming back to the possession of the former State, lose his title: but, if he has perfected it by actual possession and the exercise of his right of confiscation, they are his; and the former State takes them, if at all, as a recapture, for its own benefit, by a new title. All incorporeal rights in movables follow the fortune of the movables. They pass to the conqueror, if they are rights; and, as far as they are servitudes or liens, the conqueror takes the things purged of the servitudes or liens.

There are some kinds of public movable property the right to transfer which has been a good deal questioned; that is, collections of works of art, science, natural history, and libraries. This subject is treated in the text, *infra*, §§ 352-354; and note 170, *infra*, on the Restitution of the Collections at the Louvre. As to State papers, public archives, historical records, judicial and legal documents, &c., all publicists seem agreed that they should neither be destroyed nor removed. They are not of commercial, exchangeable value; their destruction does not aid belligerent operations; they are necessary to the proofs of private rights; and are, in fact, adherent to the local government. (Halleck's Intern. Law, 543.⁽¹⁾ Lieber's Polit. Ethics, p. 7, § 15.⁽¹¹⁾ Kent's Comm. i. 92. Heffter's Europ. Völker. § 130, 131.) [439]

(6) *Private Corporeal Property in Movables*. In modern warfare, private property in movables is not considered as transferred to the conqueror by the mere fact of belligerent occupation of the country. There must be an act of capture or transfer. The invading or occupying army will take all movables which are directly and primarily capable of use in war. (See note, *infra*, on Contraband of War; also note 171, *infra*, on Distinction between Enemy's Property at Sea and on Land.) This is because they are, in substance, contraband of war. It may also take to its own use whatever its military necessities require, as live stock, provisions, clothing, &c. Whether it shall make compensation or not, for movables of that description so taken, is matter of State or belligerent policy solely. It may also levy forced contributions on personal property, whether it be directly usable in war or not, as on the money of citizens of the conquered country, to meet its own necessities. In short, it may, if it sees fit, support itself on the resources of the invaded and occupied country. Yet no transfer of title to all or

[¹ For 543 read 453.]—G.G.W.

[¹¹ For p. 7, § 15 read Bk. 7, § 25.]—G.G.W.

frontier secured, or if the approaches to a town intended to be attacked cannot be made without laying waste the intermediate territory, the

any movables, being private property, is worked by the mere fact of belligerent occupation of the country. So much of the rights of mere booty, *loot*, or plunder, as the civilization of modern times has left, is restrained in its effects on all parties by the rule that it belongs primarily to the State, the captor taking only what is allowed him by the State, by express or implied permission.

(7) *Incorporeal Personal Rights.* Incorporeal rights belonging to things—that is, what the Roman law terms *real rights*—follow the fortune of the thing. But incorporeal rights of a purely personal character, adhering to the person, are not occupied or possessed by the conqueror, by the fact of occupying a region in which the owner of the rights resides, or even by the possession of his person. Nothing short of a reduction of the owner to slavery—no longer a permissible process—confiscates such rights. In this class, come debts and other personal obligations. The conqueror can coerce resident debtors so far as to compel them to pay him debts they owe the ejected sovereign. In such case, as we have seen *suprà*, the payment of a debt due and payable under the kind of coercion the conqueror can exert, is a defence to the resident debtor to the extent of the payment made. It does not cover mere releases or quit-tances. It is a defence to a second demand, to the extent of the coercion and actual payment. A non-resident debtor of the ejected sovereign has not the excuse of coercion; and a payment by him is in his own wrong, and not a defence against the demand of the restored sovereign. And the possession, by the military occupant, of the documentary evidence of a debt due to the ejected State or its inhabitants, does not carry with it the right to the debt itself, so as to make the military occupant the legal alienee of the creditor. (Halleck's Intern. Law. 451-3. Heffter's Europ. Völker. 134. Phillimore's Intern. Law, iii. §§ 561-2. Pfeiffer's Kriegereroberung, 165-180. Vattel, liv. iii. ch. 14, § 112.)^[1]

(8) *Slavery.* A slave stands in two relations to his master and his master's sovereign,—that of an article of property, and that of a human being. Regarded as a mere article of private property on land,—a movable corporeal chattel,—he would not be [440] transferred from the private citizen to the occupying power, except as being contraband of war: a test that could be applied only to the males capable of military service or of labor in aid of war. But, as persons capable of being used by the will of the master or his State, irrespective of their own will, in war, as soldiers or as laborers, the occupying sovereign has the right to transfer their faculty of service from the enemy to himself. They are so directly liable to State-control in war, that their condition follows the fortunes of the war. And, as the slaves are grouped, at least temporarily, in families, with rights at least moral, in the service and affection and duty of one another, the transfer includes the whole slave population—of women, children, and persons not capable of labor,—as appurtenant to the laborers. If the occupying State holds slaves, the slaves merely change master; if it does not, the slaves are emancipated. Their emancipation is as complete as their mere transfer would have been. It is a plenary act of ownership exercised upon them by the capturing power, in actual possession. The emancipating of slaves by the occupying power may also be treated as an exercise of temporary power of conquest over the political system of the ejected enemy, which, as far as it operates on slaves to give them freedom, is complete, and must be so regarded by all neutrals, and by the conquered State itself, after peace, on the principle of *uti possidetis*. It is true, that, after the Revolutionary war, the United States Government claimed compensation for slaves who were induced by proclamation to escape to the British lines, and were there protected, and carried off by the British forces; and, in the negotiations after the war of 1812, Mr. J. Q. Adams took the ground, that emancipation of slaves was not a legitimate mode of warfare. But, during this period, the slaveholding power was able to control the action of the government, in all matters bearing upon its interests. The arbitration of the Emperor of Russia related only to the construction of the article in the treaty of Ghent, and gave indemnity for slaves carried away from captured places stipulated to be restored; and he declined to award indemnification for slaves which the British forces carried from other places not stipulated to be restored. (Mr. J. Q. Adams to Mr. Rush, July 7, 1820; same to Mr. Middleton, Oct. 18, 1820; same to Mr. Monroe, Aug. 22, 1815: Am. State Papers, iv. 117. The award of the Emperor of Russia of April 22, 1822.

[¹ For § 112 read § 212.]—G.G.W.

extreme case may justify a resort to measures not [437] warranted by the ordinary purposes of war. If modern usage had sanctioned any

Martens, *Nouveau Recueil*, vi. 66. U. S. Laws, viii. 282.) During the civil war of 1861-5, the commanders of the national forces refused to restore slaves that fled to their lines, or that came under their control, to masters who were domiciled in places under control of the rebel enemies. This was a war measure, and put on the ground that the slaves were in the nature of contraband of war. By the Act of Congress of July 17, 1862 (U. S. Laws, xii. 590), slaves of any persons engaged in the rebellion, coming within the lines of the armies of the Union; and all slaves captured from such persons, or deserted by them, and coming under the control of the armies of the Union; and slaves of such persons, found in any place occupied by the rebel forces, and afterwards by the armies of the Union,—were declared to be captives of war, and to be for ever free. By the same act, the President was authorized to employ persons of African descent in the public military service. President Lincoln, by a proclamation of 1st January, 1863, designated certain States and parts of States as [441] still engaged in rebellion, and then declared as follows: 'By virtue of the power in me vested as commander-in-chief of the army and navy of the United States, in time of actual rebellion⁽¹⁾ against the authority and government of the United States, and as a fit and necessary war measure, . . . I do order and declare, that all persons held as slaves within said designated States and parts of States are, and from henceforth⁽¹¹⁾ shall be, free; and that the executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons.'

It will be observed that this order of emancipation was not a legislative act of the law-making power of the Union, but an act of the President, in his character as commander-in-chief, and a military measure. Although the language of the proclamation is general, and in the present tense, as if giving a legal *status* of freedom, from its date, to all slaves in the designated States, still, from the nature of the case, it would seem, that, being a military measure, by a commander-in-chief who had no general legislative authority over regions of country not in his possession, it could not operate further than as a military order. From that time, all slaves coming under the control of the forces of the United States, in the manner recognized by the law of belligerent occupation, were to be free. If this is the correct view of the virtue of the proclamation, it became thereafter a question of fact, as to each slave and each region of country, whether the forces of the Union had such possession as to give effect to the proclamation. In time of peace, the relation of master and slave was matter of local and not of national legislation: and it could not be maintained that the civil war gave Congress a general legislative power on that subject over regions of country covered by those States, and not in possession of the Union forces; or that the President, as commander-in-chief, had any legislative functions which could operate, by a mere declaration of his will, in places out of his belligerent control. Whether this is the proper view of the proclamation, or it had any further virtue and effect, is now of little more than speculative importance, as all the designated regions did, at last, come under the military occupation of the armies of the Union, in such sense as to effect the emancipation of all slaves, in the strictest view of the law of belligerent occupation; and the system of slavery has since been abolished, throughout the Union, by an amendment to the Constitution. The ethical objection to a general military proclamation of freedom to slaves of the enemy, and an employment of them as soldiers in war against their late masters, was not sustained by the events in the United States. The proclamation was followed by no insurrections or acts of violence by the slaves; and those employed as soldiers in the armies of the Union, obeyed the articles of war, and gave no cause of alarm or complaint.

(9) *Jus Postliminii*. In modern international law, the analogies of the Roman postliminy are extended, under the same name, and with some changes. The term is used in relation to all kinds of property and of *status*. Captivity has now no effect on the political *status* of prisoners, after a return home. By the Roman law, the master of a slave had the benefit of postliminy in all cases of return during the war, by whatever means effected. It is the opinion of most jurists, that modern international law will not now recognize that right; but that a slave, freed by a conqueror, is fixed in freedom [442] by the peace: and no neutral State will now regard the right of the former master as continuing, for any purpose, after such emancipation.

[¹ For actual rebellion *read* actual armed rebellion.]—G.G.W.

[¹¹ For henceforth *read* henceforward.]—G.G.W.

other exceptions, they will be found in the right of reprisals, or vindictive retaliation. The whole international code [438] is founded upon reciprocity. The rules it prescribes are observed by one nation, in confidence that they will be so by others. Where, then, the established usages of war are violated by an enemy, and [439] there are no other means of restraining his excesses, retaliation may justly be resorted to by the suffering nation, in order to compel the enemy to return to the observance of the law which he has violated. (a)

[440] § 348. The last war between the United States and Great Britain was marked by a series of destructive measures on the part of the latter, directed against both persons and property hitherto deemed exempt from hostilities by the general usage of civilized nations. These measures were attempted to be justified, as acts of retaliation [441] for similar excesses on the part of the American forces on the frontiers of Canada, in a letter addressed to Mr. Secretary Monroe, by Admiral Cochrane, commanding the British naval forces on the North American station, dated on board his flag-ship in the Patuxent River, on the 18th of August, 1814. In this communication it was stated that the British admiral, having been called upon by [442] the governor-general of the Canadas to aid him in carrying into effect the measures of retaliation against the inhabitants of the United States, for the wanton destruction committed by their army in Upper Canada, it had become the duty of the admiral to issue to the naval forces under his command an order to destroy and lay waste such towns and districts on the coast as might be found assailable.

Discussions between the American and British governments upon this subject, during the late war.

§ 349. In the answer of the American government to this communication, dated at Washington on the 6th of September, 1814, it was stated that it had seen, with the greatest surprise, that this system of devastation which had been practised by the British forces, so manifestly contrary to the usages of civilized warfare, was placed on the ground of retaliation. No sooner were the United States compelled to resort to war against Great Britain, than they resolved to wage it in a manner most consonant to the principles of humanity, and to those

The answer of the United States Government.

In case of recapture during war, it is matter of State policy whether the slave is remitted to his former owner. During the civil war, the United States claimed that captured slaves, freed and enrolled in the army of the Union, and then recaptured, must be treated as prisoners of war; while the rebels contended that they reverted to their masters by postliminy. Postliminy is applied to all lands; for the belligerent occupant does not acquire absolute title to them, but only the usufruct. As to all movables, the tendency of modern times is to make the title of the captor absolute, and to exclude postliminy. In maritime captures, it is excluded when the capture is complete, unless by statute or treaty. In capture of movables on land, if the capture is complete, and carries with it by international law a change of ownership, the rights of the original owner are gone; and recapture by the forces of his State leaves it matter of State policy whether he shall regain his title, and on what terms. If the treaty of peace is silent on the subject, it is presumed to leave the title in the possessor.]—D.

(a) Vattel, liv. iii. ch. 8, § 142; ch. 9, §§ 166–173. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. viii. ch. 4, §§ 272–280. Klüber, Part II. tit. 2, sect. 2, ch. 1, §§ 262–265.

friendly relations which it was desirable to preserve between the two nations, after the restoration of peace. They perceived, however, with the deepest regret, that a spirit alike just and humane, was neither cherished nor acted on by the British government. Without dwelling on the deplorable cruelties committed by the Indian savages, in the British ranks and in British pay, at the river Raisin, which had never been disavowed or atoned for, the American government referred, as more particularly connected with the subject of the above communication, to the wanton desolation that was committed, in 1813, at Havre-de-Grace and Georgetown, in the Chesapeake Bay. These villages were burnt and ravaged by the British naval forces, to the ruin of [443] their unarmed inhabitants, who saw with astonishment that they derived no protection to their property from the laws of war. During the same season, scenes of invasion and pillage, carried on under the same authority, were witnessed all along the shores of the Chesapeake, to an extent inflicting the most serious private distress, and under circumstances that justified the suspicion, that revenge and cupidity, rather than the manly motives that should dictate the hostility of a high-minded foe, led to their perpetration. The late destruction of the houses of the government at Washington, was another act which came necessarily into view. In the wars of modern Europe, no example of the kind, even among nations the most hostile to each other, could be traced. In the course of ten years past, the capitals of the principal powers of the European continent had been conquered, and occupied alternately by the victorious armies of each other, and no instance of such wanton and unjustifiable destruction had been seen. They must go back to distant and barbarous ages, to find a parallel for the acts of which the American government complained.

Although these acts of desolation invited, if they did not impose on that government the necessity of retaliation, yet in no instance had it been authorized.

The burning of the village of Newark, in Upper Canada, posterior to the early outrages above enumerated, was not executed on the principle of retaliation. The village of Newark adjoined Fort George, and its destruction was justified, by the officers who ordered it, on the ground that it became necessary in the military operations there. The act, however, was disavowed by the American government. The burning which took place at Long Point was unauthorized by the government, and the conduct of the officer had been subjected to the investigation of a military tribunal. For the burning at St. David's, committed by stragglers, the officer who commanded in that quarter was dismissed, without a trial, for not preventing it.

The American government stated, that it as little comported with any orders which had been issued to its military and naval commanders,

as it did with the known humanity of the American nation, to pursue the system which had been adopted by the British. That government owed to itself, and to the principles it had ever held sacred, to disavow, as justly chargeable to it, any such wanton, cruel, and unjustifiable warfare. Whatever unauthorized [444] irregularities might have been committed by any of its troops, it would have been ready, acting on the principles of the sacred and eternal obligation, to disavow, and, as far as might be practicable, to repair them. But in the plan of desolating warfare which Admiral Cochrane's letter so explicitly made known, and which was attempted to be excused on a plea so utterly groundless, the American government perceived a spirit of deep-rooted hostility, which, without the evidence of such fact, it could not have believed to exist, or that it would have been carried to such an extremity for the reparation of injuries, of whatsoever nature they might be, not sanctioned by the law of nations, which the naval or military forces of either power might have committed against the other. That the government would always be ready to enter into reciprocal arrangements; but should the British government adhere to a system of desolation, so contrary to the views and practices of the United States, so revolting to humanity, and so repugnant to the sentiments and usages of the civilized world, whilst it would be seen with the deepest regret, it must and would be met with a determination and constancy becoming a free people, contending in a just cause for their essential rights and their dearest interests.

§ 350. In the reply of Admiral Cochrane to the above communication, dated on the 19th September, 1814, it was stated that he had no authority from his government to enter into any kind of discussion relative to the point contained in that communication. He had only to regret that there did not appear to be any hope that he should be authorized to recall his general order, which had been further sanctioned by a subsequent request from the governor-general of the Canadas. Until the admiral received instructions from his government, the measures he had adopted must be persisted in, unless remuneration should be made to the Canadians for the injuries they had sustained from the outrages committed by the troops of the United States.^(a)

The reply
of the British
admiral.

The disavowal of the burning of Newark by the American government had been communicated to the governor-general of the Canadas, who answered on the 10th February, 1814, that it had been with great satisfaction that he had received the assurance [445] that it was unauthorized by the American government and abhorrent to every American feeling; that if any outrages had ensued, in the wanton and unjustifiable destruction of Newark, passing the bounds of just retaliation,

(a) Correspondence between Mr. Secretary Monroe and Admiral Cochrane: American State Papers, fol. edit. iii. 693, 694.

they were to be attributed to the influence of irritated passions on the part of the unfortunate sufferers by that event, which it had not been possible altogether to restrain; and that it was as little congenial to the disposition of the British government as it was to that of the United States, deliberately to adopt any plan of hostilities which had for its object the devastation of private property.

The burning
of Washing-
ton.

§ 351. Under these circumstances, the destruction of the Capitol, of the President's house, and other public buildings at Washington, in August, 1814, could not but be considered by the whole world as a most unjustifiable departure from the laws of civilized warfare. In the debate which took place in the House of Commons on the 11th of April, 1815, on the Address to the Prince Regent on the treaty of peace with the United States, Sir James Mackintosh accused the ministers of culpable delay in opening the negotiations at Ghent; which, he said, could not be explained, except⁽¹⁾ on the miserable policy of protracting the war for the sake of striking a blow against America. The disgrace of the naval war, of balanced success between the British navy and the new-born marine of America, was to be redeemed by protracted warfare, and by pouring their victorious armies upon the American continent. That opportunity, fatally for them, arose. If the Congress had opened in June, it was impossible that they should have sent out orders for the attack on Washington. They would have been saved from that success, which he considered as a thousand times more disgraceful and disastrous than the worse defeat. It was a success which had made their naval power hateful and alarming to all Europe. It was a success which gave the hearts of the American people to every enemy who might rise against England. It was an enterprise which most exasperated a people, and least weakened a government, of any recorded in the annals of war. For every justifiable purpose of present warfare, it was almost impotent. To every wise object of prospective policy, it was hostile. It was an attack, not against the strength or the resources of a State, but against the national honor and public affections [446] of a people. After twenty-five years of the fiercest warfare, in which every great capital of the European continent had been spared, he had almost said respected, by enemies, it was reserved for England to violate all that decent courtesy towards the seats of national dignity, which, in the midst of enmity, manifest the respect of nations for each other, by an expedition deliberately and principally directed against palaces of government, halls of legislation, tribunals of justice, repositories of the muniments of property, and of the records of history; objects, among civilized nations, exempted from the ravages of war, and secured, as far as possible, even from its accidental operation, because they contribute

[¹ From this point to the bottom of p. 446 the text, with slight verbal changes, is in effect a quotation from Hansard.]—G.G.W.

nothing to the means of hostility, but are consecrated to purposes of peace, and minister to the common and perpetual interest of all human society. It seemed to him an aggravation of this atrocious measure, that ministers had endeavored to justify the destruction of a distinguished capital, as a retaliation for some violences of inferior American officers, unauthorized and disavowed by their government, against he knew not what village in Upper Canada. To make such retaliation just, there must always be clear proof of the outrage; in general, also, sufficient evidence that the adverse government had refused to make due reparation for it; and, lastly, some proportion of the punishment to the offence. Here there was very imperfect evidence of the outrage—no proof of refusal to repair—and demonstration of the excessive and monstrous iniquity of what was falsely called retaliation. The value of a capital is not to be estimated by its houses, and warehouses, and shops. It consisted chiefly in what could be neither numbered nor weighed. It was not even by the elegance or grandeur of its monuments that it was most endeared to a generous people. They looked upon it with affection and pride as the seat of legislation, as the sanctuary of public justice, often as linked with the memory of past times, sometimes still more as connected with their fondest and proudest hopes of greatness to come. To put all these respectable feelings of a great people, sanctified by the illustrious name of Washington, on a level with half a dozen wooden sheds in the temporary seat of a provincial government, was an act of intolerable insolence, and implied as much contempt for the feelings of America as for the common sense of mankind.^(a)⁽¹⁾

[447] § 352. The invasion of France by the allied powers of Europe, in 1815, was followed by the forcible restitution of the pictures, statues, and other monuments of art, collected from different conquered countries during the wars of the French revolution, and deposited in the Museum of the Louvre. The grounds upon which this measure was adopted are fully explained in a note delivered by the British minister, Lord Castlereagh, to the ministers of the other allied powers at Paris, on the 11th September, 1815. In this note it was stated by the British plenipotentiary, that representations had been laid before the Congress, assembled in that capital, from the Pope, the Grand Duke of Tuscany, the King of the Netherlands, claiming, through the intervention of the allied powers, the restoration of the statues, pictures, and other works of art, of which their respective States had been successively stripped by the late revolutionary government of France, contrary to every principle of justice, and to the usages of modern warfare;—and the same having been referred for the consideration of his court, he had received the Prince Regent's commands

Restitution of the works of art in the Museum of the Louvre at Paris, in 1815, to the countries from which they had been taken during the wars of the French revolution.

(a) Hansard's Parliamentary Debates, xxx. 526, 527.

[¹ See footnote, p. 374.]—G.G.W.

to submit, for the consideration of his allies, the following remarks upon that interesting subject.

Lord Castle-
reagh's note.

§ 353. It was now the second time that the powers of Europe had been compelled, in vindication of their own liberties and for the settlement of the world, to invade France, and twice their armies had possessed themselves of the capital of the State, in which these, the spoils of the greater part of Europe, were accumulated. The legitimate sovereign of France had as often, under the protection of those armies, been enabled to resume his throne, and to mediate for his people a peace with the allies, to the marked indulgence of which neither their conduct to their own monarch, nor towards other States, had given them just pretensions to aspire. That the purest sentiments of regard for Louis XVIII., deference for his ancient and illustrious house, and respect for his misfortunes, had invariably guided the allied councils, had been proved beyond a question, by their having, in 1814, framed the treaty of Paris on the basis of preserving to France its complete integrity; and still more, after their late disappointment, by the endeavors they were again making, ultimately to combine the substantial interests of France with such an adequate system of temporary precaution, as might satisfy what they owed to the security [448] of their own subjects. But it would be the height of weakness, as well as of injustice, and, in its effects, much more likely to mislead than to bring back the people of France to moral and peaceful habits, if the allied sovereigns, to whom the world was anxiously looking up for protection and repose, were to deny that principle of integrity in its just and liberal application to other nations, their allies, (more especially to the feeble and the helpless,) which they were about, for a second time, to concede to a nation against which they had had occasion so long to contend in war. Upon what principle could France, at the close of such a war, expect to sit down with the same extent of possessions which she held before the revolution, and desire, at the same time, to retain the ornamental spoils of all other countries? Was there any possible doubt of the issue of the contest, or of the power of the allies to effectuate what justice and policy required? If not, upon what principle would they deprive France of her late territorial acquisitions, and preserve to her the spoiliations consisting of objects of art appertaining to those territories, which all modern conquerors had invariably respected, as inseparable from the country to which they belonged?

These remarks were amplified by a variety of considerations of political expediency, not necessary to be recapitulated, and the note concluded by declaring, that in applying a remedy to this offensive evil, it did not appear that any middle line could be adopted, which did not go to recognize a variety of spoiliations, under the cover of treaties, if possible more flagrant in their character than the acts of undisguised

rapine by which these remains were, in general, brought together. The principle of property, regulated by the claims of the territories from whence these works were taken, is the surest and only guide to justice; and perhaps there was nothing which would more tend to settle the public mind of Europe at this day, than such a homage on the part of the King of France to a principle of virtue, conciliation, and peace.(a)

§ 354. In the debate which took place in the House of Commons, on the 20th of February, 1816, on the peace with France, Sir Samuel Romilly, speaking incidentally of this proceeding, stated that he was by no means satisfied of its justice. It was not true that the works of art, deposited [449] in the Museum of the Louvre, had all been carried away as the spoils of war; many, and the most valuable of them, had become the property of France by express treaty stipulations; and it was no answer to say, that those treaties had been made necessary by unjust aggressions and unprincipled wars; because there would be an end of all faith between nations, if treaties were to be held not to be binding, because the wars out of which they arose were unjust, especially as there could be no competent judge to decide upon the justice of the war, but the nation itself. By whom, too, was it that this supposed act of justice and this 'great moral lesson,' as it was called, had been read? By the very powers who had, at different times, abetted France in these, her unjust wars. Among other articles carried from Paris, under the pretence of restoring them to their rightful owners, were the celebrated Corinthian horses which had been brought from Venice; but how strange an act of justice was this to give them back their statues, but not to restore to them those far more valuable possessions, their territory and their republic, which were, at the same time, wrested from the Venetians? But the reason of this was obvious: the city and the territory of Venice had been transferred to Austria by the treaty of Campo Formio, but the horses had remained the trophy of France; and Austria, whilst she was thus hypocritically reading this moral lesson to nations, not only quietly retained the rich and unjust spoils she had got, but restored these splendid works of art, not to the Venice which had been despoiled of them, the ancient, independent, republican Venice; but to Austrian Venice,—to that country, which, in defiance of all the principles she pretended to be acting on, she still retained as part of her own dominions.(a)¹⁷⁰

Views of Sir
S. Romilly.

(a) Martens, *Nouveau Recueil*, tom. ii. p. 632.

(a) Life of Romilly, edited by his sons, ii. 404.

[¹⁷⁰ *The Restitution of the Collections at the Louvre*.—Halleck (p. 454-5), on this much-debated question, says, "The impartial judge must conclude, either that such works of art are legitimate trophies of war, or that the conduct of the allied powers in 1815 was in direct violation of the law of nations. It is impossible to avoid one or the other conclusion."

It is not, however, understood that the allies treated these works of art as trophies of war to themselves, which they, as possessors, restored to the former owners; but that they required

Distinction
between
private
property
taken at sea
or on land.

[450] § 355. The progress of civilization has slowly, but constantly, tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy taken at sea or afloat in port is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be or have been his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas, the object of maritime wars is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power—which object can only be attained by the capture and confiscation of private property.¹⁷¹

France to restore them as unjustifiably taken from the owners. Doubtless, a completed conquest—by which the conquering dissolves and succeeds to the conquered sovereignty on its own soil, the former ceasing to exist—carries with it the title to public works of art, movable and immovable. But the question is, whether the temporary belligerent occupation of a conquered country, whose separate [450] sovereignty is not obliterated, gives the right to the conqueror to take and carry away to his own dominions public works of art, either by direct seizure, or through the compulsion of military requisitions and forced contributions. Anglican and Gallican bias has disturbed this question with neutrals, as well as between the parties. It cannot but be hoped, however, that such works will ever be treated as out of the category of trophies of war. They are not necessary nor useful for military operations; nor are they taken *bonâ fide* in lieu of money contributions, to be turned into money; nor does their capture coerce or restrict the military power of the enemy; and whatever is not so necessary, and does not so coerce, should be spared to the belligerent nationality, if possible. It is not a justifiable object in making war, nor a justifiable object in concluding terms of peace with a conquered nation, to enrich ourselves and impoverish our neighbor. Indemnity and security are the tests. To strip a conquered belligerent, whose sovereignty we recognize and permit to continue, of works of art,—the instructors and civilizers, as well as the just pride, of the nation,—simply to transfer those advantages to ourselves, clear of all political question of indemnity or security, and of the avowed objects and purposes of the war, is a course which the enlightened and liberal civilization of modern times ought to denounce. Whether all the allies were blameless in their own action in similar cases, and whether the sovereigns to whom those works of art were restored were entitled to sympathy, or, indeed, the fit representatives of the nations to whom the works belonged,—these are not questions of international law, but of history. The proposition of international law is this: when a nation has conquered in a war, which must be presumed to have had justifiable political purposes, and has secured those purposes, together with indemnity for the past and security for the future, and is about to leave the conquered nation an independent sovereign, on its former territory, can it also, as mere trophies or spoils of war, carry away all the public and national works of art? Is that one of its *rights*, which it may assert without treaty to that effect? It seems as if the fair statement of the proposition carried the inevitable answer.]—D.

[¹⁷¹ *Distinction between Enemy's Property at Sea and on Land.*—The text does not present the principal argument for the distinction observed in practice between private property on land and at sea; nor, indeed, has this subject been adequately treated upon principle, if that has even been attempted, by most text-writers. War is the exercise of force by bodies politic,

§ 356. The effect of a state of war, lawfully declared to exist, is to place all the subjects of each belligerent power in a state of mutual hostility. The usage of nations has modified this maxim, by legalizing such acts of hostility only as are committed by those who are authorized by the express or implied command of the State. Such are [452] the regularly commissioned naval and military forces of the nation, and all others called out in its defence, or spontaneously defending themselves in case of urgent necessity, without any express authority for that purpose. Cicero tells us, in his *Offices*, that by the Roman fecial law no person could lawfully engage in battle with the public enemy, without being regularly enrolled and taking the military oath. This was a regulation sanctioned both by policy and religion. The horrors of war would indeed be greatly aggravated, if every individual of the belligerent States was allowed to plunder and slay indiscriminately the enemy's subjects, without being in any manner accountable for his conduct. Hence it is that in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practised by civilized nations. (a)¹⁷²

What persons are authorized to engage in hostilities against the enemy.

for the purpose of coercion. Modern civilization has recognized certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it *primâ facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land. Some of the reasons for this are the infinite varieties of the character of such property,—from things almost sacred, to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of non-combatant persons and of animals; the unlimited range of places and objects that would be opened to the military; and the moral dangers attending searches and captures in households and among non-combatants. But, on the high seas, these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is *res omnium*, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field; and it is the usual object of revenue to the power under whose government the owner resides.

The matter may, then, be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for purposes of war, is *primâ facie* a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some are of this character, and some not. There are very serious objections, of a moral and economical nature, to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the *primâ facie* right of capture. To merchandise at sea, these objections apply with so little force that the *primâ facie* right of capture remains.]—D.

(a) Vattel, *Droit des Gens*, liv. iii. ch. 15, §§ 223–228. Klüber, *Droit des Gens Moderne de l'Europe*, § 267.

[¹⁷² In modern warfare, partisan and guerrilla bands are regarded as outlaws, and may

Non-com-
missioned
captors.

§ 357. It must probably be considered as a remnant of the barbarous practices of those ages when maritime war and piracy were synonymous, that captures made by private armed vessels, without a commission, not merely in self-defence, but even by attacking the enemy, are considered lawful, not indeed for the purpose of vesting the enemy's property thus seized in the captors, but to prevent their conduct from being regarded as piratical, either by their own government or by the other belligerent State. Property thus seized is condemned to the government as prize of war, or, as these captures are technically called, *Droits of Admiralty*. The same principle is applied to the captures made by armed vessels commissioned against one power, when war breaks out with another; the captures made from that other are condemned, not to the captors, but to the government. (a)

Privateers.

§ 358. The practice of cruising with private armed vessels commissioned by the State, has been hitherto sanctioned, by the laws of every maritime nation, as a legitimate means [453] of destroying the commerce of an enemy. This practice has been justly arraigned as liable to gross abuses, as tending to encourage a spirit of lawless depredation, and as being in glaring contradiction to the more mitigated modes of warfare practised by land. Powerful efforts have been made by humane and enlightened individuals to suppress it, as inconsistent with the liberal spirit of the age. The treaty negotiated by Franklin, between the United States and Prussia, in 1785, by which it was stipulated that, in case of war, neither power should commission privateers to depredate upon the commerce of the other, furnishes an example worthy of applause and imitation. But this stipulation was not revived on the renewal of the treaty, in 1799; and it is much to be feared that, so long as maritime captures of private property are tolerated, this particular mode of injuring the enemy's commerce will continue to be practised, especially where it affords the means of countervailing the superiority of the public marine of an enemy. (a)¹⁷³

be punished by a belligerent as robbers and murderers. Halleck, 386-7. Heffter, § 126. Phillimore, iii. § 96. General Scott's General Orders, 1847, No. 372. Instructions for the Government of the United States Armies, April 24, 1863, § 4.—D.

(a) Brown's⁽¹⁾ Civ. and Adm. Law, ii. 526, Appendix. Robinson's Adm. Rep. iv. 72, The Abigail. Dodson's Adm. Rep. i. 397, The Georgiana. Sparks's Diplomatic Correspondence, i. 443. Wheaton's Rep. ii.; Appendix, Note I. p. 7.

(a) Vattel, liv. iii. ch. 15, § 229. Franklin's Works, ii. 447, 530. Edinburgh Review, viii. 13-15. North American Review, ii. (N. S.) 166-196. Wheaton's Hist. Law of Nations, 308.

[¹⁷³ *Privateering*.—The first unequivocal effort to break up privateering by a permanent treaty stipulation, was that by Dr. Franklin, in the celebrated twenty-third article in the treaty with Prussia of 1785, in which the two contracting powers agree to grant no commissions to private armed vessels. The National Assembly of France, by a decree in 1792, requested the executive authorities to enter into treaties to suppress privateering; but this had no result in the action of any large maritime power. (Ortolan, tom. ii. p. 51.) The United States Government, in 1823, sent instructions to its ministers in Great Britain, France, and Russia

[¹ For Brown's read Brown's.]—G.G.W.

[454] § 359. The title to property lawfully taken in war may, upon general principles, be considered as immediately divested from the Title to property captured in war.

to propose treaties for abstaining from the use of privateers; but no such treaties were effected. (Annual Register, 1823, p. 185.) In the war between France and Spain, in 1823, the two belligerents set out with declarations against the commissioning of privateers and the capture of private property at sea; but it is supposed that the declarations, at least on the latter point, were not strictly adhered to. The result of the correspondence of the American ministers with the governments of France, England, and Russia, from 1823 to 1830, showed that those powers were not willing to enter into separate agreements with one nation to disuse privateering, while expressing a desire to see a general agreement of the chief maritime powers to that effect. (See instructions of Mr. J. Q. Adams, in 1823; and the correspondence between Mr. Rush and Messrs. Huskisson and Canning, Mr. Sheldon and M. Chateaubriand, and Mr. Middleton and Count Nesselrode, in 1823-4.) But, in all these negotiations, the question of privateering was complicated with the proposal to abandon capture of all private property at sea.

Afterwards, the United States Government ceased from its efforts to secure these objects, mainly from a change of policy. It was thought that the United States, with its small navy, might be obliged to avail itself of privateers against the formidable navies of the great European powers. (Mr. Buchanan to Count Nesselrode, 18th May, 1832; and Mr. Van Buren's instructions to Mr. Randolph, June 18, 1830.)

In the Crimean war, neither of the belligerent powers issued letters of marque. [454] France and England were anxious lest privateers should be fitted out in the United States, or vessels or citizens of the United States should be commissioned by Russia; and proposals were made to the United States, to enter into treaties, or special agreements, prohibiting the employment of privateers, and permitting neutral citizens and vessels so engaged to be treated as pirates. The United States Government declined to enter into any such engagement, thinking it necessary to reserve to itself the right to use privateers in aid of its small navy. But these powers were referred to the fact that the laws of the United States prohibit any citizen, under criminal penalties, from taking a commission or cruising against citizens or property of a nation with which we are at peace. At the same time, the United States was willing and desirous to enter into negotiations which should combine the renunciation of capture of all private property at sea with the prohibition of privateering. (Message of President Pierce, 1854, Ex. Doc. No. 103, 33d Cong. Annual Register, 1854, p. 413. *Paris Moniteur*, 9th June, 1854.)

The first article of the celebrated Declaration of Paris of 1856 is in these words: 'Privateering is and remains abolished.' The declaration is, however, only a compact between the parties in their relations with each other, and does not attempt to alter the international law on that subject. Consequently, neither of the nations who are parties to the declaration is authorized to treat as pirates the privateers of nations not parties to it, nor prohibited from itself using privateers in a war with such nations.

The original parties to the declaration were Great Britain, France, Russia, Prussia, Austria, Sardinia, and Turkey. Some forty other powers gave in their adhesion to the declaration, embracing nearly all the States of Europe and South America. It is one of the terms of the declaration, that the nations which accede to it shall enter into no treaty with a nation not a party to it, on any of the subjects it embraces, which does not adopt the four points of the declaration.

Proposals were made to the United States to accede to the declaration. Mr. Marcy, then Secretary of State, declined to become party to it as an entirety, unless with additions. The United States would not preclude itself from the use of privateers, in wars with powers which maintained large navies; and, even in wars with smaller maritime powers, its large and widespread commerce and extended seacoast would put its commerce to a disadvantage; and it was the policy of the United States not to maintain large standing armies or navies in time of peace. But the United States would accede to the declaration, if an article should be added protecting from capture all private property at sea not contraband. This proposal is often called the Marcy Amendment, or American Amendment. (Mr. Marcy to M. Sartiges, 28th July, 1856. *Message and Documents of 1856*, p. 35. Same to Mr. Mason of Dec. 8, 1856. *Message of President Pierce of December, 1856*, pp. 22-35.) Russia made known to the other parties to the declaration her readiness and desire to support the American Amendment, if its adoption should be taken into consideration by the other parties. The French, Prussian,

original owner, and transferred to the captor. This general principle is modified by the positive law of nations, in its application both to

Italian, and Netherlands governments likewise expressed to the American ministers their desire to have the American Amendment adopted. It is understood that the defeat of the amendment was caused [455] by the opposition of Great Britain. The next year (1857), President Buchanan directed a withdrawal of this offer of the United States. It is believed that the administration hesitated, even on the proposed terms, to abandon the right to use privateers.

As the parties to the Italian war of 1859 were all parties to the Declaration of Paris, privateers were not employed by them.

In the Mexican war, the United States issued no letters of marque. Mexico issued them; but they were not taken up by foreigners, on account of the repressive legislation and treaties of foreign powers. England, France, and other neutrals, especially prohibited their subjects from engaging in the war. By treaties between the United States and the powers of Spain, Prussia, Sweden, and the Netherlands, the subjects of either, found cruising as privateers against the other, when their respective countries were at peace, might be treated as pirates; and the United States had provided for the trial and punishment of subjects of powers making such treaties found so engaged. (U. S. Laws, ix. 175.)

When the civil war in the United States was imminent, and after the rebellion had organized a government, Earl Russell sought to obtain the accession of what appeared to be the coming sovereignty, to the Declaration of Paris; but the rebel government, by the proclamation of Jefferson Davis of April 17, 1861, offered letters of marque to subjects of all countries. Immediately upon the commencement of hostilities, and a few days after the proclamation by the President of the United States of a blockade of all the ports of the rebel coast, Mr. Seward sent an offer of the United States to the great powers to accede to the Declaration of Paris as it stood, without waiting for the previously proposed amendment to be adopted by all the powers. After a long correspondence between Mr. Seward, Mr. Adams, Lord Russell, Mr. Dayton, and M. Thouvenel, from which it appeared that France and Great Britain would act together, and which developed several technical difficulties, Lord Russell at last agreed to separate conventions of Great Britain and France with the United States, adopting the four points of the Declaration of Paris; adding, however, in his letter to Mr. Adams (of July 31, 1861), these words: 'I need scarcely add, that, on the part of Great Britain, the engagement will be prospective, and will not invalidate any thing already done.' The United States Government requesting an explanation of this sentence, Lord Russell transmitted the following form of declaration to be made by Great Britain on signing the convention: 'In affixing his signature to the convention of this day between Her Majesty the Queen of Great Britain and Ireland, and the United States of America, the Earl Russell declares, by order of Her Majesty, that Her Majesty does not intend thereby to undertake any engagement which shall have any bearing, direct or indirect, on the internal differences now prevailing in the United States.' The United States Government declined to make a convention with this *ex parte* declaration attached, and Great Britain declined to proceed without it: so the project of the accession of the United States to the declaration fell through. (Earl Russell to Mr. Adams, Aug. 19, 1861. Mr. Adams to Mr. Seward, Aug. 30, 1861. Mr. Adams to Earl Russell, Aug. 23, 1861. Mr. Seward to Mr. Adams, Sept. 7, 1861.)

Earl Russell, in a letter to Mr. Adams of Aug. 28, 1861, explains the purpose of Great Britain in making the special declaration. It was this: As Great Britain has [456] acknowledged belligerent rights in the Confederacy, and the Confederacy was not a party to the Declaration of Paris, Great Britain must, in consistency, regard the Confederate privateers as lawful belligerents; while the United States, claiming sovereign jurisdiction over the Confederacy, and that all its inhabitants were subject to the laws and treaties of the United States, might argue that the parties to the declaration would be bound, after the accession of the United States, to treat the privateers of the so-called Confederate States as pirates.

Mr. Seward and Mr. Adams replied, that the United States were not willing to agree to a special restriction, by one power, of a declaration of so general and lasting a character, and to which so many were parties, and as to which there was no mutuality proposed in case of civil dissensions in the dominions of the other powers. (U. S. Dip. Corr. 1861.)

In the civil war, Congress authorized the President to issue letters of marque; but he did not make use of the power. The rebel government offered its letters of marque; but, as nearly

personal and real property. As [455] to personal property, or movables, the title is, in general, considered as lost to the former proprietor, as soon as the enemy has acquired a firm possession; which, as a general rule, is considered as taking place after the lapse of twenty-four hours, or after the [456] booty has been carried into a place of safety, *infra præsidia* of the captor.(a)

§ 360. As to ships and goods captured at sea, and afterwards recaptured, rules are adopted somewhat different from those which are applicable to other personal property. These rules depend upon the nature of the different classes of cases to which they are to be applied. Thus, the recapture may be made either from a pirate; from a captor, clothed with a lawful commission, but not an enemy; or, lastly, from an enemy. Recaptures and salvage.

§ 361. 1. In the first case, there can be no doubt the property ought to be restored to the original owner; for as pirates have no lawful right to make captures, the property has not been divested. The owner has merely been deprived of his possession, to which he is restored by the recapture. For the [457] service thus rendered to him, the recaptor is entitled to a remuneration in the nature of salvage.(a) Recaptures from pirates.

Thus, by the Marine ordinance of Louis XIV., of 1681, liv. iii. tit. 9, des Prises, art. 10, it is provided, that the ships and effects of the subjects or allies of France, retaken from pirates, and claimed within a year and a day after being reported at the Admiralty, shall be restored to the owner, upon payment of one third of the value of the vessel and goods, as salvage. And the same is the law of Great Britain, but there is no doubt that the municipal law of any particular State may ordain a different rule as to its own subjects. Thus the former usage of Holland

all the maritime powers had warned their subjects that if they served in privateers in the war, their governments would not interfere to protect them, and as the United States had threatened to treat such persons as pirates, and the naval power of the United States was formidable, no avowedly foreign private armed vessels took letters of marque; and the ostensibly Confederate vessels were commissioned as of its regular navy. Mr. Seward instructed Mr. Adams to say to Lord Russell, that, if the United States made use of privateers under the act, it would be only to suppress the piracy of European gunboats fitted out and sent from their ports, in disregard of their obligations to the United States, to prey upon American commerce. (Letter of July 12, 1862: U. S. Dip. Corr. 1862, p. 135.) The provisions in the treaties of 1794 with Great Britain, and of 1778 with France, that the subjects of either, serving as privateers against the other, when the respective nations were at peace, might be treated as pirates, have expired; and they have not been renewed in the later treaties.]—D.

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 3; cap. 9, § 14. Klüber, Droit des Gens Moderne de l'Europe, § 254. Vattel, Droit des Gens, liv. iii. ch. 13, § 196; ch. 14, § 209. Heffter Europ. Völker. § 136.

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 9, § 17. Loccenius, de Jur. Marit. lib. ii. ch. 2,⁽¹⁾ No. 4. Brown's⁽¹¹⁾ Civ. and Adm. Law, ii. ch. 3,⁽¹¹¹⁾ 461. 'Ea quæ piratæ nobis eripuerunt, non opus habent postliminio; quia jus gentium illis non concedit, ut jus domini mutari possint.' Dig. de Capt. et Postl. revers.

[¹ For ch. 2 read ch. 3.]—G.G.W.

[¹¹¹ For ch. 3 read ch. 11.]—G.G.W.

[¹¹ For Brown's read Browne's.]—G.G.W.

and Venice gave the whole property to the retakers, on the principle of public utility; as does that of Spain, if the property has been in the possession of the pirates twenty-four hours.(b)

Opinions of
Valin and
Pothier.

§ 362. Valin, in his commentary upon the above article of the French Ordinance, is of opinion that if the recapture be made by a foreigner, who is the subject of a State, the law of which gives to the recaptors the whole of the property, it could not be restored to the former owner: and he cites, in support of this opinion, a decree of the Parliament of Bordeaux, in favor of a Dutch subject, who had retaken a French vessel from pirates.(a) To this interpretation Pothier objects that the laws of Holland having no power over Frenchmen and their property within the territory of France, the French subject could not thereby be deprived of the property in his vessel, which was not divested by the piratical capture according to the law of nations, and that it ought consequently to be restored to him upon payment of the salvage prescribed by the ordinance.(b)

Under the term *allies* in this article are included *neutrals*; and Valin holds that the property of the subjects of friendly powers, retaken from pirates by French captors, ought not to be restored to them upon the payment of salvage, if the law of their own country gives it wholly to the retakers; otherwise there would be a [458] defect of reciprocity, which would offend against that impartial justice due from one State to another.(c)¹⁷⁴

Recapture
of neutral
property.

§ 363. 2. If the property be retaken from a captor clothed with a lawful commission, but not an enemy, there would still be as little doubt that it must be restored to the original owner. For the act of taking, being in itself a wrongful act, could not change the property, which must still remain in him.

If, however, the neutral vessel, thus recaptured, were laden with contraband goods destined to an enemy of the first captor, it may, perhaps, be doubted whether they should be restored, inasmuch as they were liable to be confiscated as prize of war to the first captor. Martens states the case of a Dutch ship, captured by the British, under the rule of the war of 1756, and recaptured by the French, which was adjudged to be restored by the Council of Prizes, upon the ground that the

(b) Grotius par Barbeyrac, liv. iii. ch. 9, § 16, No. 1, and note.

(a) Valin, Comm. sur l'Ord. liv. iii. tit. 9, art. 10.

(b) Pothier, Traité de Propriété, No. 101.

(c) Valin, Comm. sur l'Ord. liv. iii. tit. 9, art. 10.

¹⁷⁴ Hautefeuille, Droits des Nat. Neutr. tom. iv. p. 427. Acts 13 & 14 Victoria, ch. 26, 27; and 17 & 18 Victoria, ch. 19, 78;⁽¹⁾ and 27 & 28 Victoria, § 40.⁽¹¹⁾ In the United States, recaptures from pirates are restored to the owners, subject to salvage; but the amount of salvage in such cases is not regulated by a fixed rule, but left to the discretion of the court, upon the circumstances of each case, unless under treaty stipulations. (U. S. Laws, xii. 314.) As to recaptures in war, see note 175, *infra*, on Recaptures.]—D.

[¹ For 78 read §§ 7, 8.]—G.G.W.

[¹¹ After Victoria, insert ch. 25.]—G.G.W.

Dutch vessel could not have been justly condemned in the British prize courts. But if the case had been that of a trade, considered contraband by the law of nations and treaties, the original owner would not have been entitled to restitution.^(a)

§ 364. In general, no salvage is due for the recapture of neutral vessels and goods, upon the principle that the liberation of a *bonæ fidei*⁽¹⁾ neutral from the hands of the enemy of the captor is no beneficial service to the neutral, inasmuch as the same enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized.

No salvage for the recapture of *bonâ fide* neutrals.

§ 365. It was upon this principle that the French Council of Prizes, determined, in 1800, that the American ship *Statira*, captured by a British, and recaptured by a French [459] cruiser, should be restored to the original owner, although the cargo was condemned as contraband or enemy's property. The sentence of the court was founded upon the conclusions of M. Portalis, who stated that the recapture of foreign neutral vessels by French cruisers, whether public ships or privateers, gave no title to the retakers. The French prize code only applied to French vessels and goods recaptured from the enemy. According to the universal law of nations, a neutral vessel ought to be respected by all nations. If she is unjustly seized by the cruisers of any one belligerent nation, this is no reason why another should become an accomplice in this act of injustice, or should endeavor to profit by it. From this maxim it followed as a corollary that a foreign vessel, asserted to be neutral, and recaptured by a French cruiser from the enemy, ought to be restored on due proof of its neutrality. But, it might be asked, why treat a foreign vessel with more favor in this case than a French vessel? The reason was obvious. On the supposition on which the regulations relating to this matter were founded, the French ship fallen into the hands of the enemy would have been lost for ever, if it had not been retaken; consequently the recapture is a prize taken from the enemy. If the case, however, be that of a foreign vessel, asserted to be neutral, the seizure of this vessel by the enemy does not render it *ipso facto* the property of the enemy, since its confiscation has not yet been pronounced by the competent judge; until that judgment has been pronounced, the vessel thus navigating under the neutral flag loses neither its national character nor its rights. Although it has been seized as prize of war, it may ultimately be restored to the original owner. Under such circumstances, the recapture of this vessel

The case of *The Statira*.

(a) Martens, *Essai sur les Prises et les Reprises*, § 52. 'Sa majesté a jugé pendant la dernière guerre, que la reprise du navire neutre faite par un corsaire Français (lorsque le navire n'était pas chargé de marchandises prohibées, ni dans le cas d'être confisqué par l'ennemi) était nulle.' Code des Prises, an 1784, tom. ii.

[1 For *bonæ fidei* read *bonâ fide*.]—G.G.W.

cannot transfer the property to the recaptor. The question of neutrality remains entire, and must be determined, before such a transmutation of property can take place. Such was the language of all public jurists, and such was the general usage of all civilized nations. It followed that the vessel in question was not confiscable by the mere fact of its having been captured by the enemy. Before such a sentence could be pronounced, the French tribunal must do what the enemy's tribunal would have done; it must determine the question of neutrality; and that being determined in favor of the claimant, restitution would follow of course.(a)

Exception
to this rule.

[460] § 366. To this general rule, however, an important exception has been made, founded on the principle above quoted from the Code des Prises, in the case where the vessel or cargo recaptured was practically liable to be confiscated by the enemy. In that case, it is immaterial whether the property be justly liable to be thus confiscated according to the law of nations; since that can make no difference in the meritorious nature of the service rendered to the original owner by the recaptor. For the ground upon which salvage is refused by the general rule, is, that the prize courts of the captor's country will duly respect the obligations of that law; a presumption which, in the wars of civilized States, as they are usually carried on, each belligerent nation is bound to entertain in its dealings with neutrals. But if, in point of fact, those obligations are not duly observed by those tribunals, and, in consequence, neutral property is unjustly subjected to confiscation in them, a substantial benefit is conferred upon the original owner in rescuing his property from this peril, which ought to be remunerated by the payment of salvage. It was upon this principle that the Courts of Admiralty, both of Great Britain and the United States, during the maritime war which was terminated by the Peace of Amiens, pronounced salvage to be due upon neutral property retaken from French cruisers. During the revolution in France, great irregularity and confusion had arisen in the prize code formerly adopted, and had crept into the tribunals of that country, by which neutral property was liable to condemnation upon grounds both unjust and unknown to the law of nations. The recapture of neutral property, which might have been exposed to confiscation by means of this irregularity and confusion, was, therefore, considered by the American and British courts of prize, as a meritorious service, and was accordingly remunerated by the payment of salvage.(a) These abuses were corrected under the consular government, and so long as the decisions of the Council of Prizes were conducted by that learned and virtuous

(a) *Décision relative à la prise du navire le Statira*, 6 Thermidor, an 8, pp. 2-4.

(a) *The War Onskan*, Robinson's Adm. Rep. ii. 299; *The Eleonora Catharina*, Ib. iv. 156; *The Carlotta*, Ib. v. 54; *The Huntress*, Ib. vi. 104. *Talbot v. Seeman*, Cranch's Rep. i. 1. *S. C. Dallas's Rep.* iv. 34.

magistrate, M. Portalis, there was no particular ground of complaint on the part of neutral nations as to the practical administration of the prize code until the promulgation of the Berlin decree in 1806. This measure occasioned the exception to the rule as to [461] salvage to be revived in the practice of the British Courts of Admiralty, who again adjudged salvage to be paid for the recapture of neutral property which was liable to condemnation under that decree. (b) It is true that the decree had remained practically inoperative upon American property, until the condemnation of the cargo of *The Horizon* by the Council of Prizes, in October, 1807; and therefore it may perhaps be thought, in strictness, that the English Court of Admiralty ought not to have decreed salvage in the case of *The Sansom*, more especially as the convention of 1800, between the United States and France, was still in force, the terms of which were entirely inconsistent with the provisions of the Berlin decree. But as the cargo of *The Horizon* was condemned in obedience to the imperial rescript of the 18th September, 1807, having been taken before the capture of *The Sansom*, whether that rescript be considered as an interpretation of a doubtful point in the original decree, or as a declaration of an anterior and positive provision, there can be no doubt *The Sansom* would have been condemned under it; consequently a substantial benefit was rendered to the neutral owner by the recapture, and salvage was due on the principle of the exception to the general rule. And the same principle might justly be successively applied to the prize proceedings of all the belligerent powers during the last European war, which was characterized by the most flagrant violations of the ancient law of nations, which, in many cases, rendered the rescue of neutral property from the grasp of their cruisers and prize courts, a valuable service entitling the recaptor to a remuneration in the shape of salvage.

§ 367. 3. Lastly, the recapture may be made from an enemy.

The *jus postliminii* was a fiction of the Roman law, by which persons or things taken by the enemy were held to be restored to their former state, when coming again under the power of the nation to which they formerly belonged. It was applied to free persons or slaves returning *postliminii*; and to real property and certain movables, such as ships of war and private vessels, except fishing and pleasure boats. These things, therefore, when retaken, were restored to the original proprietor, as if they had never been [462] out of his control and possession. (a) Grotius attests, and his authority is supported by that of the *Consolato del Mare*, that by the ancient maritime law of Europe,

Recapture
from an
enemy.

(b) *The Sansom*, Robinson's Adm. Rep. vi. 410. *The Acteon*, Edwards's Adm. Rep. i. 254.

(a) Inst. lib. i. tit. 12, Dig. l. 49, tit. 15. 'Navis longis atque onerariis, postliminium est, non piscatus aut voluptatis causa.' (1) Dig. 49.

[1 *Digest* XLIX, xv. 2, reads: Navibus longis atque onerariis propter belli usum postliminium est, non piscatoriis aut si quas acturias voluptatis causa paraverunt.]—G.G.W.

if the thing captured were carried *infra præsidia* of the enemy, the *jus postliminii* was considered as forfeited, and the former owner was not entitled to restitution. Grotius also states, that by the more recent law established among the European nations, a possession of twenty-four hours was deemed sufficient to divest the property of the original proprietor, even if the captured thing had not been carried *infra præsidia*. (b) And Loccenius considers the rule of twenty-four hours' possession as the general law of Christendom at the time when he wrote. (c) So, also, Bynkershoek states the general maritime law to be, that if a ship or goods be carried *infra præsidia* of the enemy, or of his ally, or of a neutral, the title of the original proprietor is completely divested. (d)

Rule of
amicable
retaliation,
or recipro-
city, applied
to recaptures
of the pro-
perty of
allies.

§ 368. Sir W. Scott, in delivering the judgment of the English Court of Admiralty, in the case of *The Santa Cruz* and other Portuguese vessels recaptured, in 1796 and 1797, from the common enemy by a British cruiser, stated that it was certainly a question of much curiosity to inquire what was the true rule on this subject. 'When I say *the true rule*, I mean only the rule to which civilized nations, attending to just principles, ought to adhere; for the moment you admit, as admitted it must be, that the practice of nations is various, you admit thatⁱ there is no rule operating with the proper force and authority of a general law. It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hours' possession; or it might be the rule of bringing *infra præsidia*; or it might be a rule requiring an actual sentence orⁱⁱ condemnation: either of these rules might be sufficient for general [463] practical convenience, although in theory perhaps one might appear more just than another; but the fact is that there is no such rule of practice. Nations concur in principles,ⁱⁱⁱ indeed, so far as to require^{iv} firm and secure possession; but these^v rules of evidence respecting that^{vi} possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion of European States more distinctly agreed on any principle, as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation

(b) 'Cui consequens esse videtur, ut in mari naves, et res aliæ captæ censeantur tum demum, cum in navalia aut portus, aut ad eum locum ubi tota classis se tenet, perducta sunt: nam tunc desperari incipit recuperatio, sed *recentiori jure gentium* inter Europæos populos introductum, videmus, ut talia capta censeantur ubi per horas viginti quatuor in potestate hostium fuerint.' Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 3. Consolato del Mare, cap. 287, § 1. Wheaton's Rep. v.; Appendix, 56. Ayala, de Jur. Bel. ac Pac. cap. 5. Wheaton's Hist. Law of Nations, 45.

(c) Loccenius, de Jure Marit. lib. ii. cap. 4, § 4.

(d) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

[ⁱ Omit that before there is.]—G.G.W.

[ⁱⁱⁱ For principles read principle.]—G.G.W.

[^v For these read their.]—G.G.W.

[ⁱⁱ For or read of.]—G.G.W.

[^{iv} For to require read require.]—G.G.W.

[^{vi} For that read the.]—G.G.W.

would lie under an obligation to observe it. That obligation could only arise⁽ⁱ⁾ from a reciprocity of practice in other nations; for, from the very circumstance of the prevalence of a different rule among other nations, it would become not only lawful, but necessary to that one nation to pursue a different conduct: for instance, were there a rule prevailing among other nations, that the immediate possession, and the very act of capture should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle, and to lay it down as a general rule, that a bringing *infra præsidia*, though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right. The effect of adhering to such a rule would be gross injustice to British subjects; and a rule, from which gross injustice must ensue in practice, can never be the true rule of law between independent nations; for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety, therefore, is on one side, and real practical justice on the other, the rule of substantial justice must be held to be the true rule of the law of nations between independent States.

§ 369. 'If I am asked, under the known diversity of practice on this subject, what is the proper rule for a State to apply to the recaptured property of its allies? I should answer, that the liberal and rational proceeding would be to apply in the first instance the rule of that country to which the recaptured property belongs. I admit the practice of nations is not so; but I think such a rule would be both liberal and just. To the recaptured, it presents his own consent, bound [464] up in the legislative wisdom of his own country: to the recaptor, it cannot be considered as injurious, where the rule of the recaptured would condemn, whilst the rule of the recaptor prevailing among⁽ⁱⁱ⁾ his own countrymen, would restore, it brings an obvious advantage; and even in case⁽ⁱⁱⁱ⁾ of immediate restitution, under the rules of the recaptured, the recapturing country would rest secure in the reliance of receiving reciprocal justice in its turn.

Opinion
of Sir W.
Scott on
The Santa
Cruz.

'It may be said, what if this reliance should be disappointed?—Redress must then be sought from retaliation; which, in the disputes of independent States, is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution. This will be their ultimate security, and it is a security sufficient to warrant the trust. For the transactions of States cannot be balanced by minute arithmetic; something must, on all occasions, be hazarded on just and liberal presumption.^(iv)

[ⁱ For only arise read arise only.]—G.G.W.

[ⁱⁱ For among read amongst.]—G.G.W.

[ⁱⁱⁱ For case read the case.]—G.G.W.

[^{iv} For presumption read presumptions.]—G.G.W.

‘Or it may be asked, what if there is no rule in the country of the recaptured?—I answer, first, this is scarcely to be supposed; there may be no ordinance, no prize acts immediately applying to recapture; but there is a law of habit, a law of usage, a standing and known principle on the subject, in all civilized commercial countries: it is the common practice of European States, in every war, to issue proclamations and edicts on the subject of prize; but till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of their prize acts. But secondly, if there should exist a country in which no rule prevails,—the recapturing country must of⁽ⁱ⁾ necessity apply its own rule, and rest on the presumption that *that* rule will be adopted and administered in the future practice of its allies.

‘Again, it is said that a country applying to other countries their own respective rules, will have a practice discordant and irregular: it may be so; but it will be a discordance proceeding from the most exact uniformity of principle; it will be *idem per diversa*. It is asked, also, will you adopt the rules of Tunis and Algiers? If you take the people of Tunis and Algiers for your allies, undoubtedly you must; you must act towards them on the same rules of relative justice on which you conduct yourselves towards other nations. And upon the whole of these objections it is to be observed, that a rule may bear marks of apparent inconsistency, and yet⁽ⁱⁱ⁾ contain much relative fitness and propriety; a [465] regulation may be extremely unfit to be made, which yet shall be extremely fit, and shall indeed be the only fit rule to be observed towards other parties, who have originally established it for themselves.

‘So much it might be necessary to explain myself on the mere question of propriety; but it is much more material to consider, what is the actual rule of the maritime law of England on this subject. I understand it to be clearly this, that the maritime law of England, having adopted a most liberal rule of restitution or⁽ⁱⁱⁱ⁾ salvage with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle. In such a case, it adopts their rule, and treats them according to their own measure of justice. This I consider to be the true statement of the law of England on this subject. It was clearly so recognized in the case of *The San Jago*^(iv); a case which was not, as it has been insinuated, decided on special circumstances, nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found among^(v) the manuscript

[ⁱ For must of read must then of.]-G.G.W.

[ⁱⁱⁱ For or read on.]-G.G.W.

[^v For among read amongst.]-G.G.W.

[ⁱⁱ For yet read nevertheless.]-G.G.W.

[^{iv} For Jago read Iago.]-G.G.W.

collections of a very distinguished⁽ⁱ⁾ practitioner in this profession, (Sir E. Simpson,)⁽ⁱⁱ⁾ which records the practice and the rule as it was understood to prevail in his time. ⁽ⁱⁱⁱ⁾The rule is: that England restores, on salvage, to its allies; but if instances can be given of British property retaken by them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule.'^(a)

§ 370. The law of our own country proceeds on the same principle of reciprocity, as to the restitution of vessels or goods belonging to friendly foreign nations, and recaptured from the enemy by our ships of war. By the act of Congress of the 3d March, 1800, ch. xiv. § 3, it is provided that the vessel or goods of persons permanently resident within the territory, and under the protection of any foreign government in amity with the United States, and retaken by their vessels, shall be restored to the owner, he paying, for salvage, such portion of the value thereof as by the law and usage of such foreign governments shall be required of any vessel [466] or goods of the United States under like circumstances of recapture; and where no such law or usage shall be known, the same salvage shall be allowed as is provided in the case of the recapture of the property of persons resident within or under the protection of the United States. Provided that no such vessel or goods shall be restored to such former owner, in any case where the same shall have been condemned as prize by competent authority, before the recapture; nor in any case, where by the law and usage of such foreign government, the vessels or goods of citizens of the United States would not be restored in like circumstances.¹⁷⁵

American law adopts the rule of reciprocity as to restitution of the property of friendly nations, recaptured from an enemy.

(a) Sir W. Scott, in the *Santa Cruz*, Robinson's Adm. Rep. i. 58-63.

[¹⁷⁵ *Recaptures*.—The revision of the Prize Code of the United States, by statute of June 30, 1864, ch. 174, repeals all former statutes on the subject of prize. Its provisions as to recapture are condensed into a single section (sec. 29.) It adopts the rule of restoration at any time before condemnation by a competent authority. If the recaptured property belonged to 'persons residing in^(iv) or under the protection of the United States,' restoration is to be made 'upon the payment of such sum as the court may award as salvage, costs, and expenses.' If the property belong to persons 'permanently resident within the territory and under the protection of any foreign prince, government, or State in amity with the United States, and, by the law or usage of such prince, government, or State, the property of a citizen of the United States would be restored under like circumstances of recapture, it shall be adjudged to be restored to such owner upon his claim, upon such terms as, by the law or usage of such prince, government, or State, would be required of a citizen of the United States under like circumstances of recapture; and, when no such law or usage shall be known, it shall be adjudged to be restored upon the payment of such salvage, costs, and expenses as the court shall order.' In all cases where the court is to determine the amount of salvage, it is to be, not by a fixed rule, as before, but 'a meet and competent sum, according to the circumstances of each case.' But nothing in the act is to be 'construed to contravene any treaty of the United States.' Accordingly, if by any treaty there is to be restoration without salvage, or a fixed proportion is to be given as salvage, the treaty provision will govern the court. (Act 30th June, 1864, ch. 174, § 29. U. S. Laws, xiii. 314.) In the case of *The Lilla* (Sprague's Decisions, ii.; and Law Reporter, xxv. p. 92), Judge Sprague decided that restitution should be made of the prize

[¹ For distinguished read experienced.]—G.G.W.

[ⁱⁱ For Simpson read Simson.]—G.G.W.

[ⁱⁱⁱ The sentence: The rule is . . . according to their own rule should be enclosed in double quotation marks.]—G.G.W.

[^{iv} For in read within.]—G.G.W.

Laws of
different
countries as
to recap-
tures.

§ 371. It becomes then material to ascertain what is the law of different maritime nations on the subject of recaptures; and this must be sought for either in the prize code and judicial decisions of each country, or in the treaties by which they are bound to each other.

British law.

§ 372. The present British law of military salvage was established by the statutes of the 43d Geo. III. ch. 160, [467] and the 45th Geo. III. ch. 72, which provide that any vessel, or goods therein, belonging to British subjects, and taken by the enemy as prize, which shall be retaken, shall be restored to the former owners, upon payment for salvage of one eighth part of the value thereof, if retaken by His Majesty's ships; and if retaken by any privateer, or other ship or vessel under His Majesty's protection, of one sixth part of such value. And if the same shall have been retaken by the joint operation of His Majesty's ships and privateers, then the proper court shall order such salvage to be paid as shall be deemed fit and reasonable. But if the vessel so retaken shall appear to have been set forth by the enemy as a ship of war, then the same shall not be restored to the former owners, but shall be adjudged lawful prize for the benefit of the captors.¹⁷⁶

American
law.

§ 373. The act of Congress of the 3d March, 1800, ch. xiv. §§ 1, 2, provides that, in case of recaptures of vessels or goods belonging to persons resident within, or under the protection of the United States, *the same not having been condemned as prize by competent authority*, before the recapture, shall be restored on payment of salvage of one

to citizens of the United States, her former owners, although she had been condemned as prize by a court at Charleston, S.C., established by the rebel government as a prize court. This was on the clear ground that a court of the United States could not recognize as valid, or give any effect to, an act of such a tribunal in the case of property of its own citizens.]-D.

[¹⁷⁶ The British Parliament passes prize acts usually to meet each new war. A royal proclamation declares the royal intention, of the royal bounty, to give to captors certain shares, or the whole, as may be, of prizes captured in the existing war, and regulates the distribution of prize-money among captors. An Act of Parliament is passed at the same time, referring to the proclamation, and establishing, apparently independently, the same rights in captors and rules for distribution. It is singular, that in none of the British prize decisions is this peculiarity noticed; and, indeed, it is very difficult to learn from them what is the source of authority for the distribution of prizes. The explanation of this twofold action probably is, that while it is not questioned that all prizes belong to the crown, yet Parliament does deny the right of the crown to give away property which it holds strictly in its sovereign or public capacity, as a trust; and takes the ground, that prizes are of this character, and so confirms the royal grant.

The last prize act (27 & 28 Victoria, § 40⁽²⁾) provides that property of a British subject, recaptured from a public enemy by a king's ship, shall be restored on the payment of one-eighth of its value, and, in cases of extraordinary merit, of not exceeding one-quarter, in lieu of salvage; but, if the recaptured vessel had been 'set forth or used as a ship or vessel of war' by the enemy, it is not restored.

This statute differs from the United States statute now in force in three particulars: (1) It regulates salvage by a fixed rule, while that of the United States gives a meet salvage, according to the circumstances of each case. (2) It puts no limit of time or event to the right of restoration, while that of the United States does not restore after condemnation by a competent tribunal. (3) The United States statute makes no exception in case of vessels set forth or used as vessels of war.]-D.

[¹ After Victoria, insert ch. 25.]-G.G.W.

eighth of the value if recaptured by a public ship; and if the recaptured vessel shall appear to have been [468] set forth and armed as a vessel of war before such capture, or afterwards, and before the recapture, then the salvage to be one moiety of the value. If the recaptured vessel previously belonged to the Government of the United States, and be *unarmed*, the salvage is one sixth, if recaptured by a private vessel, and one twelfth, if recaptured by a public ship; if *armed*, then the salvage to be one moiety if recaptured by a private vessel, and one fourth if recaptured by a public ship. In respect to public armed ships, the cargo pays the same rate of salvage as the vessel, by the express words of the act; but in respect to private vessels, the rate of salvage (probably by some unintentional omission in the act) is the same on the cargo, whether the vessel be armed or unarmed.^(a)

It will be perceived, that there is a material difference between the American and British laws on this subject; the act of Parliament continuing the *jus postliminii* for ever, between the original owners and recaptors, even if there has been a previous sentence of condemnation, unless the vessel retaken appears to have been set forth by the enemy as a ship of war; whilst the act of Congress continues the *jus postliminii* until the property is divested by a sentence of condemnation in a competent court, and no longer; which was also the maritime law of England, until the statute stepped in, and, *as to British subjects*, revived the *jus postliminii* of the original owner.¹⁷⁷

§ 374. By the more recent French law on the subject of recaptures, if a French vessel be retaken from the enemy after being in his hands more than twenty-four hours, it is good prize to the recaptor; but if retaken before twenty-four hours have elapsed, it is restored to the owner, with the cargo, upon the payment of one third the value for salvage, in case of recapture by a privateer, and one thirtieth in case of recapture by a public ship. But in case of recapture by a public ship, after twenty-four hours' possession, the vessel and cargo are restored on a salvage of one tenth. French law.

Although the letter of the ordinances, previous to the Revolution, condemned, as good prize, French property recaptured after being twenty-four hours in possession of the enemy, whether the same be retaken by public or private armed vessels; yet it seems [469] to have been the constant practice in France to restore such property when recaptured by the king's ships.^(a) The reservation contained in the ordinance of the 15th of June, 1779, by which property recaptured

(a) The *Adeline*. Cranch's Rep. ix. 244.

[¹⁷⁷ The Prize Act of 30th June, 1864, ch. 174, § 29, repeals all prior provisions on this subject. See note 175, *ante*, on Recaptures.]—D.

(a) Valin, sur l'Ord. liv. iii. tit. 9, art. 3.⁽¹⁾ *Traité des Prises*, ch. 6, § 1, No. 8, § 88.⁽¹¹⁾ Pothier, *Traité de Propriété*, No. 97. Emerigon, *des Assurances*, tom. i. p. 497.

[¹ For art. 3 read art. 8.]—G.G.W.

[¹¹ For § 88 read p. 88.]—G.G.W.

after twenty-four hours' possession by the enemy, was condemned to the crown, which reserved to itself the right of granting to the recaptors such reward as it thought fit, made the salvage discretionary in every case, it being regulated by the king in council according to circumstances.(b)

France applies her own rule to the recapture of the property of her allies. Thus, the Council of Prizes decided on the 9th February, 1801, as to two Spanish vessels recaptured by a French privateer after the twenty-four hours had elapsed, that they should be condemned as good prize to the recaptor. Had the recapture been made by a public ship, whether before or after twenty-four hours' possession by the enemy, the property would have been restored to the original owner, according to the usage with respect to French subjects, and on account of the intimate relation subsisting between the two powers.(c)

The French law also restores, on payment of salvage, even after twenty-four hours' possession by the enemy, in cases where the enemy leaves the prize a derelict, or where it reverts to the original proprietor in consequence of the perils of the seas, without a military recapture. Thus the Marine Ordinance of Louis XIV., of 1681, liv. iii. tit. 9, art. 9, provides that, 'if the vessel, without being recaptured, is abandoned by the enemy, or if, in consequence of storms or other accident, it comes into the possession of our subjects, before it has been carried into an enemy's port, (*avant qu'il ait été conduit dans aucun port ennemi*); it shall be restored to the proprietor, who may claim the same within a year and a day, although it has been more than twenty-four hours in the possession of the enemy.' Pothier is of opinion that the above words, *avant qu'il ait été conduit dans aucun port ennemi*, are to be understood, not as restricting the right of restitution to the particular case mentioned of a vessel abandoned by the enemy before being carried into port, which case is mentioned merely as an [470] example of what ordinarily happens, '*parce que c'est le cas ordinaire auquel un vaisseau échappé à l'ennemi qui l'a pris, ne pouvant pas guères lui échapper lorsqu'il a été conduit dans ses ports.*'(d) But Valin holds, that the terms of the ordinance are to be literally construed, and that the right of the original proprietor is completely divested by the carrying into an enemy's port. He is also of opinion that this species of salvage is to be likened to the case of shipwreck, and that the recaptors are entitled to one third of the value of property saved.(e) Azuni contends that the rule of salvage in this case is not regulated by the

(b) Emerigon, des Assurances, tom. i. p. 497.

(c) Pothier, de Propriété, No. 100. Emerigon, tom. i. p. 499. Azuni, Droit Maritime de l'Europe, Partie II. ch. 4, (1) § 11.

(d) Pothier, de Propriété, No. 99.

(e) Valin, sur l'Ord. *in loco*.

[1 After Partie II. insert art. V.]—G.G.W.

ordinance, but is discretionary, to be proportioned to the nature and extent of the service performed, which can never be equal to the rescue of property from the hands of the enemy by military force, or to the recovery of goods lost by shipwreck.(f) Emerigon is also opposed to Valin on this question.(g)¹⁷⁸

§ 375. Spain formerly adopted the law of France as to recaptures, Spanish law. having borrowed its prize code from that country ever since the accession of the house of Bourbon to the Spanish throne. In the case of *The San Jago*⁽ⁱ⁾ (mentioned in that of *The Santa Cruz*, before cited,) the Spanish law was applied, upon the principle of reciprocity, as the rule of British recapture of Spanish property. But by the subsequent Spanish prize ordinance of the 20th of June, 1801, art. 38, it was modified as to the property of friendly nations; it being provided that when the recaptured ship is not laden for enemy's account, it shall be restored, if recaptured by public vessels, for one eighth, if by privateers for [471] one sixth salvage: provided that the nation to which such property belongs has adopted, or agrees to adopt, a similar conduct towards Spain. The ancient rule is preserved as to recaptures of Spanish property; it being restored without salvage, if recaptured by a king's ship before or after twenty-four hours' possession; and if recaptured by a privateer within that time, upon payment of one third for salvage; if recaptured after that time, it is condemned to the recaptors. The Spanish law has the same provisions with the French in cases of captured property becoming derelict, or reverting to the possession of the former owners by civil salvage.¹⁷⁹

§ 376. Portugal adopted the French and Spanish law of recaptures, in her ordinances of 1704 and 1796. But in May, 1797, after *The* Portuguese law.

(f) Azuni, *Droit Maritime*, Partie II. ch. 4, §§ 8, 9.

(g) Emerigon, *des Assurances*, tom. i. pp. 504, 505. He cites, in support of his opinion, the *Consolato del Mare*, cap. 287, and *Targa*, cap. 46, No. 10.

[¹⁷⁸ The present position of the French law, as derived from the ordinance of 1681, and that of 15th June, 1779, and the *arrêté du 2 Prairial*, an 11, is this: If the recapture be made by a public ship, the property is restored, whether recaptured before or after the lapse of twenty-four hours; if by a private ship, only in case of recapture before the lapse of that time. The salvage in case of a public ship is one-tenth of the value of the prize, if recaptured after twenty-four hours, and one-thirtieth if before that time. In case of recapture by a private ship, the salvage is one-third. As has been seen, the privateer does not make restitution after twenty-four hours. The expenses of the recaptors are borne by the recaptured property. The recaptured vessels of an ally stand on the same ground with those of French subjects. *Hautefeuille*, *des Nat. Neutr.* tit. 13, ch. 3, tom. iii. p. 380. *Pistoye et Duverdy*, *des Prises*, tit. 7, tom. ii. pp. 104, 109. *Halleck*, *Intern. Law*, 881. *Phillimore*, *Intern. Law*, iii. §§ 413, 418.]—D.

[¹⁷⁹ *Phillimore* (iii. § 412) gives in detail the Spanish ordinances, presenting some features not noticed in the text. He considers the Spanish law to place recaptures from pirates substantially on the same ground with recaptures from enemies. The treaty between England and Spain of 3d February, 1814, provides for a salvage of one-eighth to a public ship, and one-sixth to a privateer, and seems to require restoration in all cases, without reference to lapse of time, but not of vessels which the enemy has set forth as vessels of war.]—D.

[¹ *For Jago read Iago.*]—G.G.W.

Santa Cruz was taken, and before the judgment of the English High Court of Admiralty was pronounced in that case, Portugal revoked her former rule by which twenty-four hours' possession by the enemy divested the property of the former owner, and allowed restitution after that time, on salvage of one eighth, if the capture was by a public ship, and one fifth if by a privateer. In *The Santa Cruz* and its fellow cases, Sir W. Scott distinguished between recaptures made *before* and *since* the ordinance of May, 1797; condemning the former where the property had been twenty-four hours in the enemy's possession, and restoring the latter upon payment of the salvage established by the Portuguese ordinance.

Dutch law. § 377. The ancient law of Holland regulated restitution on the payment of salvage at different rates, according to the length of time the property had been in the enemy's possession.^(a)¹⁸⁰

Danish law. § 378. The ancient law of Denmark condemned after twenty-four hours' possession by the enemy, and restored if the property had been a less time in the enemy's possession, [472] upon payment of a moiety of the value of salvage. But the ordinance of the 28th March, 1810, restored Danish or allied property without regard to the length of time it might have been in the enemy's possession, upon payment of one third the value.¹⁸¹

Swedish law. § 379. By the Swedish ordinance of 1788, it is provided, that the rates of salvage on Swedish property shall be one half the value, without regard to the length of time it may have been in the enemy's possession.¹⁸²

What constitutes a 'setting forth as a vessel of war,' under the prize act. § 380. What constitutes a *setting forth as a vessel of war*, has been determined by the British Courts of Prize, in cases arising under the clause in the act of Parliament, which may serve for the interpretation of our own law, as the provisions are the same in both. Thus it has been settled, that where a ship was originally armed for the slave-trade, and after capture an additional number of men were put on board, but there was no commission of war, and no additional arming, it was not a setting forth as a vessel of war under the act.^(a) But a commission of war is decisive if there be guns on board.^(b) And where the vessel after the capture, has been fitted out as a privateer, it is conclusive

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

[¹⁸⁰ For the history and particulars of the rules of the States General on this subject, see Phillimore, iii. § 413. Recueil van Zeezaken, D. 3, p. 348. De Martens, Essai, p. 204,⁽¹⁾ § 68; p. 117,⁽¹¹⁾ § 66.]—D.

[¹⁸¹ But see Phillimore, iii. § 414. De Martens, Essai, pp. 200, 204, § 68. Hübner, de la Saisie, p. 11, App.]—D.

[¹⁸² Phillimore, iii. § 416. De Martens, Essai, 207,⁽¹¹¹⁾ § 70; and p. 49, note g.]—D.

(a) The *Horatio*, Robinson's Adm. Rep. vi. 320.

(b) The *Ceylon*, Dodson's Adm. Rep. i. 105.

[¹ For p. 204 read p. 199.]—G.G.W.

[¹¹¹ For 207 read 202.]—G.G.W.

[¹¹ For p. 117 read p. 193.]—G.G.W.

against her, although when recaptured, she is navigating as a mere merchant ship; for where the former character of a captured vessel had been obliterated by her conversion into a ship of war, the legislature meant to look no further, but considered the title of the former owner for ever extinguished. (c) Where it appeared that the vessel had been engaged in the military service of the enemy, under the direction of his minister of the marine, it was held as a sufficient proof of a setting forth as a vessel of war. (d) So where the vessel is armed, and is employed in the public military service of the enemy by those who have competent authority so to employ it, although it be not regularly commissioned. (e) But the mere employment in the enemy's military service is not sufficient; but if there be a fair semblance of authority in the person directing [473] the vessel to be so employed, and nothing upon the face of the proceedings to invalidate it, the court will presume that he is duly authorized; and the commander of a single ship may be presumed to be vested with this authority as commander of a squadron. (f)

§ 381. It is no objection to an allowance of salvage, or a recapture, that it was made by a non-commissioned vessel; it is the duty of every citizen to assist his fellow citizens in war, and to retake their property out of the enemy's possession; and no commission is necessary to give a person so employed a title to the reward which the law allots to that meritorious act of duty. (a) And if a convoying ship recaptures one of the convoy, which has been previously captured by the enemy, the recaptors are entitled to salvage. (b) But a mere rescue of a ship engaged in the same common enterprise gives no right to salvage. (c)

§ 382. To entitle a party to salvage, as upon a recapture, there must have been an actual or constructive capture; for military salvage will not be allowed in any case where the property has not been actually rescued from the enemy. (a) But it is not necessary that the enemy should have actual possession; it is sufficient if the property is completely under the dominion of the enemy. (b) If, however, a vessel be captured going in distress into an enemy's port, and is thereby saved, it is merely a case of *civil* and not of *military* salvage. (c) But to constitute a recapture, it is not necessary that the recaptors should have a bodily and actual possession; it is sufficient if the prize be actually

Recapture
by a non-
commissioned
vessel.

Military
salvage for
recapture.

(c) The Actif, Edwards's Adm. Rep. 185.

(d) Robinson's Adm. Rep. iii. 65.

(e) The Ceylon, Dodson's Adm. Rep. i. 105.

(f) The Georgiana, Dodson's Adm. Rep. i. 397.

(a) The Helen, Robinson's Adm. Rep. iii. 224.

(b) The Wight, Robinson's Adm. Rep. vi. ⁽¹⁾ 315.

(c) The Belle, Edwards's Adm. Rep. i. 66.

(a) The Franklin, Robinson's Adm. Rep. iv. 147.

(b) The Edward and Mary, Robinson's Adm. Rep. iii. 305. The Pensamento Felix, ⁽¹¹⁾ Edwards's Adm. Rep. i. 116.

(c) The Franklin, Robinson's Adm. Rep. iv. 147.

[¹¹ For Rep. vi read Rep. v.]—G.G.W.

[¹¹ For Felix read Felix.]—G.G.W.

rescued from the grasp of the hostile captor.(d) Where a hostile ship is captured, and afterwards recaptured by the enemy, and again recaptured from the enemy, the original captors are not entitled to restitution on paying salvage, but the last captors are entitled to the whole rights of prize; for, by the first recapture, [474] the right of the original captors is entirely divested.(e) Where the original captors have abandoned their prize, and it is subsequently captured by other parties, the latter are solely entitled to the property.(f) But if the abandonment be involuntary, and produced by the terror of superior force, and especially if produced by the act of the second captors, the rights of the original captors are completely revived.(g) And where the enemy has captured a ship, and afterwards deserted the captured vessel, and it is then recaptured, this is not to be considered as a case of derelict; for the original owner never had the *animus delinquendi*, and therefore it is to be restored on payment of salvage; but as it is not strictly a recapture within the Prize Act, the rate of salvage is discretionary.(h) But if the abandonment by the enemy be produced by the terror of hostile force, it is a recapture within the terms of the act.(i) Where the captors abandon their prize, and it is afterwards brought into port by neutral salvors, it has been held, that the neutral Court of Admiralty has jurisdiction to decree salvage, but cannot restore the property to the original belligerent owners; for by the capture, the captors acquired such a right of property as no neutral nation can justly impugn or destroy, and, consequently, the proceeds, (after deducting salvage,) belong to the original captors; and neutral nations ought not to inquire into the validity of a capture between belligerents.(j) But if the captors make a donation of the captured vessel to a neutral crew, the latter are entitled to a remuneration as salvors; but after deducting salvage, the remaining proceeds will be decreed to the original owner.(k) And it seems to be a general rule, liable to but few exceptions, that the rights of capture are completely divested by a hostile recapture, escape, or voluntary discharge of the captured vessel.(l) And the same principle seems applicable to a *hostile* rescue; but [475] if the rescue be made by the *neutral* crew of a neutral ship, it may be doubtful how far such an illegal act, which involves the penalty of confiscation, would be held,

(d) *The Edward and Mary*, Robinson's Adm. Rep. iii. 305.

(e) Robinson's Adm. Rep. iv. 217, note a. Wheaton's Rep. i. 125, *The Astrea*. Valin, sur l'Ord. tom. ii. pp. 257-259. *Traité des Prises*, ch. 6, § 1. Pothier, *Traité de la Propriété*, No. 99.

(f) *The Lord Nelson*, Edwards's Adm. Rep. i. 79. *The Diligentia*, Dodson's Adm. Rep. i. 404.

(g) *The Mary*, Wheaton's Rep. ii. 123.

(h) *The John and Jane*, Robinson's Adm. Rep. iv. 216.

(i) *The Gage*, Robinson's Adm. Rep. vi. 273.

(j) *The Mary Ford*, Dallas's Rep. iii. 188.

(k) *The Adventure*, Cranch's Rep. viii. 227.

(l) *Hudson v. Guestier*, Cranch's Rep. iv. 293; *Ib.* vi. 281, S. C. *The Diligentia*, Dodson's Adm. Rep. i. 404.

in the prize courts of the captor's country, to divest his original right in case of a subsequent recapture.¹⁸³

[¹⁸³ *Rescue by Neutrals*.—The law respecting rescue by neutrals has received full consideration in the late case of the ship *Emily St. Pierre*. This was a British vessel, captured by the United States blockading squadron, in the act of breaking the blockade of Charleston, S.C., and ordered to Philadelphia for adjudication in charge of a prize crew. The original crew, by fraud and force, regained possession, and took the vessel to Liverpool and restored her to the possession of her owners. Mr. Adams applied to Earl Russell for a restoration of the vessel, on the ground that the rescue was a violation of the law of nations, which furnished sufficient cause for condemnation, and a breach of the duty of a neutral, who is bound to submit to the adjudication of the prize court of the captor. Earl Russell refused the demand on two grounds,—*first*, that, as the rescue was not a violation of any municipal law of England, and as the vessel was not in the custody of the British Government, that government had no legal right to take her from the hands of her owners, or to prosecute or proceed against the vessel or the owners for any violation of law; and *second*, that, in addition to the technical objection, the offence was solely one against the laws of war made for the benefit of captors, which the captors could assert and vindicate only in their own tribunals. Admitting that rescue was ground for condemnation, he contended that the decree could only be made by the belligerent prize court. No other court, either of the belligerent or of a neutral country, had jurisdiction to condemn or restore property taken in war. If the private neutral rescues his vessel by force, he takes all risks of the captor's rights of force recognized by nations, but nothing more. The courts and government of the neutral country cannot decide that the title to the vessel has passed to the captors before condemnation by the prize courts of the captor's country. All they can do is to restore to the captor the temporary possessory right, which he has between capture and condemnation. Such possessory right he held to be one of force, which the captor's government could guard and assert by condemnation or other penalty on the property, if in its possession, through its prize court; but, even by the courts of the captor, the neutral rescuer could not be personally punished, as for a crime. He contended that it was not incumbent on neutral governments to make laws to enforce such belligerent possessory rights against their own citizens, any more than it is in case of crimes committed by their own citizens abroad, whom they do not even deliver up to the offended government for trial, except by treaty stipulation; or in case of violations of the revenue or embargo laws of other countries, which they never even indirectly take active cognizance of; or in case of successful breach of blockade.

In the course of the correspondence, Mr. Adams cited a parallel case, in which the position of the two governments was reversed, as early as 1799, that of the brig *Experience*. She was an American vessel, captured (with two other vessels) by a British cruiser, rescued by her crew, and brought to Philadelphia. By direction of Lord Grenville, of Oct. 21, 1799, Mr. Liston demanded her restoration by the American Government, by letter of May⁽⁴⁾ 2, 1800. The Secretary of State, Mr. Pickering, by letter to Mr. Liston, of May 3, 1800, declined to interfere, and upon the ground that it was an inchoate and belligerent right of captors, which the neutral government cannot be expected to enforce against its own subjects; but referred the British Minister [476] to the Admiralty Courts of the United States, giving no opinion on the question beyond declining executive intervention.

The papers on the interesting question of the brig *Experience* were searched for and exchanged between the two governments by both Earl Russell and Mr. Adams; and Earl Russell stated that there was no evidence in the Foreign Office that the opinion of the law-officer of the crown had been taken in that case, or that any further proceedings were had after the reply of Mr. Pickering. Mr. Adams, on his part, did not press further the case of *The Emily St. Pierre*, nor attempt proceedings in the Admiralty Courts of Great Britain.

It may therefore be considered as settled by these two cases, that a neutral government is not required, by executive action, to restore a private vessel of one of its citizens which has been rescued by her crew from her captors before condemnation, on demand of the government of the captors. The possessory, belligerent right of the captors is not to be enforced by neutral powers by any positive action in the way of penalty or seizure for restitution. Whether the

[¹ For May read February.]—G.G.W.

Salvage
on a second
recapture, or
a rescue or
restitution.

[476] § 383. As to recaptors, although their right to salvage is extinguished by a subsequent hostile recapture and regular sentence of condemnation, divesting the original owners of their property, yet if the vessel be restored upon such recapture, and resume her voyage, either in consequence of a judicial acquittal, or a release by the sovereign power, the recaptors are reintegrated in their right of salvage.^(a) And recaptors and salvors have a legal interest in the property, which cannot be divested by other subjects, without an adjudication in a competent court; and it is not for the government's ships or officers, or for other persons, upon the ground of superior authority, to dispossess them without cause.^(b)¹⁸⁴

right can be vindicated by a possessory suit by the captors in the Admiralty Courts of the neutral, has not been judicially determined; but the course of the political departments of both governments, and the reasoning on which they proceeded, seem to settle the judicial as well as the political question.

(Correspondence of Earl Russell and Mr. Adams, from April 24, 1862, to July 21, 1862. U. S. Dip. Corr. 1862, pp. 75-148, at intervals.) See note 175, *supra*, on Recaptures; and note 184, *infra*, on Salvage for Rescue or Recapture.]—D.

(a) The Charlotte Caroline, Dodson's Adm. Rep. i. 192.

(b) The Blendenhale,¹ Dodson's Adm. Rep. i. 414.

[¹⁸⁴ *Salvage for Rescue or Recapture*.—Where the original crew of a vessel, being in the custody of captors, rise upon them and regain possession, it is called a rescue. But, if the vessel is recovered from the possession of the captors by a force from without, before condemnation, it is a simple recapture. In either case, the retaking being for the benefit of the owners, or held to be so in contemplation of law, if they reclaim their property, a case of salvage is presented. In a case of rescue of a vessel of commerce, the salvage is civil, and the cause does not go into a prize court. Recapture from an enemy is cognizable by a prize court as a belligerent act, and presents a case of military salvage. If, in addition to the belligerent recapture, there has been a voluntary act of saving from a distinct marine peril, beyond the obligations of the parties, civil salvage may be combined with the military, and incidentally [477] adjudicated by the prize court having cognizance of the recapture. It is the duty of persons in the naval service, in time of war, to recapture as much as to capture; but it is a duty they owe to their government; and the policy and practice has always been, if the owner claims his vessel, to require him to pay salvage to the recaptors, which is in lieu of the prize-money they would receive in case the recaptured vessel had been condemned as prize. The mariner's contract with the owners, in a vessel of commerce, does not oblige him to attempt a rescue, after capture by a belligerent enemy, in such a sense that his refusal or failure to attempt it, in a proper case, would be a breach of his contract. It is, therefore, always a case for salvage. (Two Friends, Rob. i. 271. The Lilla, Sprague's Decisions, ii.; and Law Reporter, xxv. 92. Helen, Rob. iii. 224.)

If a cruiser takes a prize and loses it, whether by rescue, recapture, or otherwise, and she is again captured by a second cruiser of the same nation, it is not a recapture for the benefit of the first captor, subject to salvage, but an original capture. For these and like cases of mixed recapture, see Valin, *Traité des Prises*, ch. vi. § 1. The Polly, Nov. 21, 1780, Rob. iv. 217, note. The Marguerite,¹¹ April 3, 1781. Astrea, Wheat. i. 125. Lord Nelson, Edw. 79. Diligence, Dods. i. 404. John and Jane, Rob. iv. 216. Gage, Rob. vi. 273. Ordonnance de 1681, Des Prises, art. 9, 'De Propriété,' No. 99. Azuni, *Partie II.* ch. 4, §§ 8, 9.¹¹¹ Emerigon, *des Assurances*, tit. i. p. 504-5. Phillimore's *Intern. Law*, iii. § 424. Chitty's *Law of Nations*, 91. The Short Staple, Cranch, ix. 55. Bello, *Princ. de Der. Nat.* 193. Henry, Edw. 66.¹¹⁷

Salvage is not due to a public ship for extricating another public ship from danger of

¹ For Blendenhale read Blenden-Hall.]—G.G.W.

¹¹ For Marguerite read Margueritte.]—G.G.W.

¹¹¹ For ch. 4, §§ 8, 9 read ch. 4, art. v, §§ 8, 9.]—G.G.W.

¹¹⁷ For 66 read 192.]—G.G.W.

[477] § 384. In all cases of salvage where the rate is not ascertained by positive law, it is in the discretion of the court, as well upon recaptures as in other cases.^(a) And where, upon a recapture, the parties have entitled themselves to a *military* salvage, under the Prize Act, the court may also award them, in addition, a civil salvage, if they have subsequently rendered extraordinary services in rescuing the vessel in distress from the perils of the seas.^(b)

Rate of salvage.

§ 385. The validity of maritime captures must be determined in a court of the captor's government, sitting either in his own country or in that of its ally. This rule of jurisdiction applies, whether the captured property be carried into a port of the captor's country, into that of an ally, or into a neutral port.

Validity of maritime captures, determined in the courts of the captor's country.

[478] § 386. Respecting the *first* case, there can be no doubt. In the *second* case, where the property is carried into the port of an ally, there is nothing to prevent the government of the country, although it cannot itself condemn, from permitting the exercise of that final act of hostility, the condemnation of the property of one belligerent to the other; there is a common interest between the two governments, and both may be presumed to authorize any measures conducing to give effect to their arms, and to consider each other's ports as mutually subservient. Such an adjudication is therefore sufficient, in regard to property taken in the course of the operations of a common war.¹⁸⁵

Condemnation of property lying in the ports of an ally.

§ 387. But where the property is carried into a *neutral* port, it may appear, on principle, more doubtful whether the validity of a capture can be determined even by a court of prize established in the captor's country; and the reasoning of Sir W. Scott, in the case of *The Henrick and Maria*, is certainly very cogent, as tending to show the irregularity of the practice; but he considered that the English Court of Admiralty had gone too far in its own practice of condemning captured vessels lying in neutral ports, to recall it to the proper purity of the original principle. In delivering the judgment of the Court of Appeals in the same case, Sir William Grant also held that Great Britain was con-

Property carried into a neutral port.

capture, in a common enterprise. *The Belle*, Edw. 66. Sir W. Scott said it would be converting every engagement into a struggle for salvage.

As to rights of revenue cutters and privateers in recaptures, see *The Wanstead*, Edw. i. 369.⁽¹⁾ *The Providence*, Ib. 270. *The Dorothy Foster*, Rob. vi. 88. *The Bellona*, Edw. 63. *The Sedulous*, Dods. i. 253. U. S. Prize Act 1864, ch. 174, §§ 10, 32, 33. (U. S. Laws, xiii. 306.)—D.

(a) *Talbot v. Seaman*,⁽¹¹⁾ Cranch's Rep. i. 1. Robinson's Adm. Rep. iii. 308. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

(b) *The Louisa*, Dodson's Adm. Rep. i. 317.

[¹⁸⁵ In the Crimean war, 1854, by a convention between the allies, the adjudication, in case of joint capture, lay with the country of the superior officer; but this was only as between the allies. Neutrals could not object to a condemnation made otherwise, if sanctioned by the law of nations; nor, on the other hand, would a neutral be bound by it, if it were not so sanctioned.]—D.

[¹ For 369 read 269.]—G.G.W.

[¹¹ For *Seaman* read *Seeman*.]—G.G.W.

cluded, by her own inveterate practice, and that neutral merchants were sufficiently warranted in purchasing under such a sentence of condemnation, by the constant adjudications of the British tribunals. The same rule has been adopted by the Supreme Court of the United States, as being justifiable on principles of convenience to belligerents as well as neutrals; and though the prize was in fact within a neutral jurisdiction, it was still to be considered as under the control of the captor, whose possession is considered as that of his sovereign.^(a)

Jurisdiction
of the courts
of the captor,
how far ex-
clusive.

[479] § 388. This jurisdiction of the national courts of the captor, to determine the validity of captures made in war under the authority of his government, is exclusive of the judicial authority of every other country, with two exceptions only:—1. Where the capture is made within the territorial limits of a neutral State. 2. Where it is made by armed vessels fitted out within the neutral territory.^(a)

In either of these cases, the judicial tribunals of the neutral State have jurisdiction to determine the validity of the captures thus made, and to vindicate its neutrality by restoring the property of its own subjects, or of other States in amity with it, to the original owners. These exceptions to the exclusive jurisdiction of the national courts of the captor, have been extended by the municipal regulations of some countries to the restitution of the property of their own subjects, in all cases where the same has been unlawfully captured, and afterwards brought into their ports; thus assuming to the neutral tribunal the jurisdiction of the question of prize or no prize, wherever the captured property is brought within the neutral territory. Such a regulation is contained in the Marine Ordinance of Louis XIV., of 1681, and its justice is vindicated by Valin, upon the ground that this is done by way of compensation for the privilege of asylum granted to the captor and his prizes in the neutral port. There can be no doubt that such a condition may be expressly annexed by the neutral State to the privilege of bringing belligerent prizes into its ports, which it may grant or refuse at its pleasure, provided it be done impartially to all the belligerent powers; but such a condition is not implied in a mere general permission to enter the neutral ports. The captor, who avails himself of such a permission, does not thereby lose the military possession of the captured property, which gives to the prize courts of his own country exclusive jurisdiction to determine the lawfulness of the capture. This jurisdiction may be exercised either whilst the captured property is lying in the neutral port, or the prize may be carried thence *infra præsidia* of the captor's country where the tribunal is sitting. In either

(a) Henrick and Maria, Robinson's Adm. Rep. iv. 43; vi. 138, note a. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5. Duponceau's Transl., note, p. 38. Kent's Commentaries, i. 103. Wheaton's Hist. Law of Nations, 321.

(a) The Estrella, Wheaton's Rep. iv. 298; The Santissima Trinidad, Ib. vii. 283.

case, the claim of any neutral proprietor, even a subject of the State into whose ports the captured vessel or goods may have been carried, must, in general, be asserted in the prize court of the belligerent country, [480] which alone has jurisdiction of the question of prize or no prize.^(b)¹⁸⁶

(b) Valin, Comment. sur l'Ordon. de la Marine, liv. iii. tit. 9. Des Prises, art. 15, tom. ii. p. 274. Lampredi, Trattato del Commercio de' Popoli neutrali in Tempo di Guerra, p. 228.

[¹⁸⁶ *Prize Jurisdiction and Practice*.—The author's object being to treat upon rights and obligations, rather than upon remedies, he has not extended his notice of prize procedures. A fuller consideration of them may be desirable.

I. PRIZE TRIBUNALS. A trial by a prize tribunal is not a right enemies can claim, nor a duty to them. They have no standing in court. If it be assumed that all captures are enemy's property, there need be no prize courts. But the fact that so large a proportion of them are of neutral property charged as involved in violation of rights of war, or of property whose nationality as neutral or hostile is doubtful, has led to the establishing of these tribunals. Their origin is in the responsibility of the belligerent government to neutral governments, for the acts of its cruisers. The true nature of a prize tribunal may be described by a phrase for which, indeed, I find no precedent, but which is, nevertheless, appropriate,—*an inquest by the State*. As the belligerent sovereign is responsible to neutral governments for aggressions on the persons or property of their subjects, he desires and is required to inform himself, by recognized modes, of the lawfulness of the capture. For this purpose, he commissions learned and impartial persons, by a temporary commission, or by permanent legislation, to hold an inquest on all captures.

II. SUMMARY HEARING AND DECISION. Certain modes of conducting this inquest have been long in use, and are now recognized by nations as satisfactory. The inquest, in the beginning, is summary, and by no means in the nature of litigation *inter partes*. Neither is it *ex parte*. It is, in fact, an inquiry by the government, through its commission, into the facts, there being no parties litigant. The prize court examines the vessel and cargo, and all the papers found on board, and then examines for itself, by its own interrogatories, the persons found on board the prize, the captors taking no part, any more than the captured. This examination is conducted by the court or its officers, in the absence of all parties. The captors are not examined, nor any other witnesses, whatever may be their knowledge. The persons on board are examined privately, and without opportunity to confer with the parties interested in the prize, or with counsel; and, for that purpose, the law of nations allows the court to use the necessary restraint. The evidence so obtained, as well as the papers found on board, is sealed and kept secret until it is completed. It is then opened, and may then be inspected by parties interested, for the purpose of being heard by counsel before the court. With this official inquest upon the vessel, cargo, papers, and persons found on board, ends the regular and ordinary function of the court, so far as evidence is concerned. Arguments by counsel for parties interested are allowed. If this examination presents a clear case for condemnation, the court makes a decree accordingly. The evidence taken in this summary hearing is called the evidence *in preparatory*, which means, not preparatory to a fuller examination, but preparatory to the decision by the court. The decision of the court upon this evidence is to be considered as, in ordinary cases, all that can be expected of the court. It is its complete and regular function.

But, as it will sometimes happen that this evidence leaves the case in doubt, or suggests the existence of evidence *aliunde*, which may be necessary to justice, the court will, in its discretion, direct what is called 'further proof;' but this is never done until the evidence *in preparatory* is completed and passed upon. In fact, the meaning [481] of 'further proof' is, proof beyond the vessel, cargo, and papers and persons on board. If the proofs in preparatory are unsatisfactory, the court will order further proofs, of its own motion. If the proofs in preparatory are satisfactory, a very strong case must be made out to induce the court to expand and alter its function from that of a belligerent commission of inquest on prescribed kinds of proof, into that of a judicial tribunal to decide between litigating parties admitted to plead and counterplead, and to introduce evidence generally.

On the hearing upon the proofs in preparatory, the onus is on the claimant of any captured

Condemnation by consular tribunal

[481] § 389. This jurisdiction cannot be exercised by a delegated authority in the neutral country, such as a consular tribunal sitting in

property to prove his title and right of possession, and his right under the laws of war, upon the evidence, to have it restored to him. Any suppression or destruction of proofs, or unreasonable refusal to answer interrogatories, by persons on board, may exclude the person claiming as owner from a right to restitution.

III. LITIGATION IN PRIZE COURTS. When the prize is brought within the custody of the court, notice is given to all the world, that any person having an interest in the prize may appear and claim it. This is, of course, though not in terms, confined to citizens or neutrals. An enemy cannot make claim. If the property is ostensibly not hostile, it is usually claimed by the master or supercargo, or, in their absence, by the consul of the neutral. The claim is simply a statement of the nature and extent of the claimant's property, and a denial of all enemy's interest, supported by an oath, called the *test affidavit*. The affidavit is required to declare that the claimant has property and right of possession solely for himself, and to disclaim or disclose all fiduciary or other interests behind him. The object of this is not only to disclaim hostile interests, but to enable the court to learn who are the real, ultimate, and equitable, as well as the ostensible and legal owners. There is nothing in the nature of what are technically called *pleadings*—*i.e.*, allegations and denial or admission of facts—*inter partes*. The captors or the government, in their libel, make no allegation of any fact necessary to condemn the property, or even of the cause of capture. The libel is only a petition to the court to hold its inquest, for the purpose of ascertaining the facts, and whether there are any objections to condemnation; and should properly contain only a description of the prize, with dates, &c., for identification, and the fact that it was taken as prize of war by the cruiser, and brought to the court for adjudication,—*i.e.*, of facts enough to show that it is a maritime cause of prize jurisdiction, and not a case of municipal penalty or forfeiture. As there are no allegations by the captors in the libel, there are no denials or counter-allegations in the claim, except the general denial that the property is lawful prize, which the court requires under oath, as a test of the claimants. Although a claim may be put in, in the first instance, by the master or supercargo as agent, yet the court will require, as soon as may be, a claim by the asserted owner, and his personal oath. The court also requires security from the claimants, for costs, and as a test of sincerity. If no claim is made after a reasonable time, and the evidence in preparatory is satisfactory, either alone, or coupled with the significant fact of no claim being made, a condemnation follows. If there is no evidence in preparatory (as may sometimes happen), or if it is not by itself, or coupled with the fact [482] aforesaid sufficient to justify condemnation, and the ground for condemnation must be, not the opinion of the court, but simply a rule that unclaimed property is to be condemned,—that is, the rule of default,—the court is required by the law of nations to wait a year and a day for claimants to appear. But this is only where the condemnation is solely on the ground of default. If the court is satisfied that the owners know of the pending adjudication and do not appear, that fact is sufficient alone, or with other facts, for condemnation without delay.

There being a claimant before the court, and the preparatory proofs having been considered and found satisfactory, the claimant may petition the court to allow him opportunity to obtain further proofs. As such a course not only prolongs the examination and changes the functions of the tribunal, but may be abused by latent enemies or neutrals acting in bad faith, it is closely watched and cautiously granted. The claimant must make a sworn statement of the specific facts he intends to prove; the means of proof he wishes to resort to; identify persons or documents where that is possible; and state the grounds for a belief that such evidence does exist and can be obtained, and probably will be sufficient, if obtained, to reverse the decision of the court. A further reason for strictness in this particular is that, so far, the evidence has come entirely from the claimant; that is, from his vessel, cargo, papers, and crew. On this petition, the captors or the government will be heard as well as the claimant. If the court shall allow the petition, it also, as of course, allows the captors, at the same time, to take like evidence, to meet the further proofs of the claimant. The court is careful to limit the new inquiry to specified facts, and, for that purpose, sometimes will require the parties to file regular pleadings, as in a civil suit in Admiralty; averring and denying the facts to be inquired into, and ending in certain issues between them. This course is termed admitting the parties to 'plea and proof.' If that is not done in form, still the order of the court limits the subject of

the neutral port, and acting in pursuance of instructions from the captor's State. Such a judicial authority, in the matter of prize of war, sitting in the neutral country.

inquiry. It also settles the time for filing the proofs, and orders the mode of taking them. Although affidavits, in the later and strict sense,—that is, *ex parte* statements on oath,—may be received, it is the custom in the United States, when further proof is allowed, to require it to be taken in the form of what are now strictly called depositions, that is, answers to written interrogatories filed by one party, with cross-interrogatories (or the opportunity to file them) by the other party. In like manner, if on the proofs in preparatory there shall not be ground for condemnation, the court will entertain a petition by the captors for further proofs.

On the return of further proofs, the cause is again heard on this new proof, in connection with that in preparatory, and a final decision reached.

IV. RULES OF DECISION. The theory upon which prize courts proceed seems to be this: The capture is an act of the government, or adopted as such by the request of the government for a condemnation. Before condemning it, opportunity is given, [483] to any person who has a title to it, to establish a right of restitution. *Primâ facie*, the prize is the property of the government. No one is heard to contest or object to the title of the government but a citizen or neutral who has an interest in the property. Any intervenor must, of course, not only prove his title and right of possession,—as in the case of lost goods sought to be taken from the hands of a finder,—so that, if restored, it shall be to the right person, but must also show, that, as the general owner and possessor before capture, he has a right under the laws of war, upon the evidence, to a restitution. By this is not meant that the evidence must be produced by the claimant, but that, upon all the evidence, wherever it comes from, and upon all the inferences, the *onus* is upon him to establish a right to restitution. If the claimant fails either to make out a clear, *bonâ fide* title to the property and possession, irrespective of the belligerent question; or if, having such title, he fails to establish his right to restitution as against the government, and the case, after the fullest examination and hearing of counsel, is left in doubt,—the claimant before the court fails. If no other claimants appear who can establish a right, the capture stands justified; and the property is condemned to the government, or, in other words, not being restored, remains in the government.

V. INTERNATIONAL RESPONSIBILITY. But the prize court, after all, is not a tribunal to which parties have voluntarily subjected themselves, by putting either their persons or their property within its jurisdiction. On the contrary, the property, being usually on the high seas and under neutral flags, and not within the jurisdiction of the belligerent, is seized by force, under powers of war, and carried by force into the belligerent's jurisdiction, and the neutral owner compelled to appear before the foreign tribunal, the creature of the belligerent, or lose his property. The sovereign is therefore held responsible to the State whose citizen the claimant is, that no injustice is done by the capture. If the sovereign does not submit the capture to adjudication, or if the court is not constituted or does not proceed in the manner recognized by the usage of nations, or, still more, if the sovereign should undertake to confiscate the property against the decision of his own tribunal, a cause of complaint exists between the two States. But, if these rules are observed, and the claimant's sovereign objects only to the correctness of the decision, although it is not conclusive upon the sovereign, still it is the interest and custom of nations to yield to a decision by such a tribunal, professedly grounded on the general law of nations, though with a protest, to save the question in future cases, rather than make it a cause of war or reprisals. If the decision is rendered in obedience to a rule laid down by the sovereign, and not in accordance with the existing law of nations, the reason for acquiescence ceases. The responsibility for the capture and condemnation lying upon the State, as a belligerent act, the State is not bound by a favorable decision of its own tribunal. It may and should, notwithstanding the decree of condemnation, make restitution or compensation, on the demand of the sovereign of the claimant, if justice or policy require it. Any rights of the captors to prize-money, as against their own government, cannot interfere with the exercise of its sovereign political functions with other nations. It must satisfy the claims of its own officers in some other way. In [484] short, the whole proceeding, from the capture to the condemnation, is a compulsory proceeding *in invitum* by the State, in its political capacity, in the exercise of war-powers, for which it is responsible, as a body politic, to the State of which the owner of the property is a citizen; and the interposition by the sovereign, of an inquest by a court of his own appointment, subject to his rules on points of international law, if he sees fit

cannot be conceded by the neutral State to the agents of a belligerent power within its own territory, where even the neutral government

to lay down any, is only a contrivance of the civilization of modern times to render less probable illegal captures and unjustifiable confirmations of such captures by the State. The further to insure these results, and to do more full and speedy justice to persons whose property is improperly seized, it is the further duty of the prize court, on restoring captured property, to assess the damages which the claimant has suffered. These are in the form of a decree against the captors; for the prize court cannot make a decree against its own sovereign: but, upon the cardinal principle of sovereign responsibility above alluded to, if the captors do not pay the damages (as usually they are not able to), the government of the captor is called upon by the government of the claimant to make them good. In respect to liability for damages, the rule is this: The duty of the lawful cruiser in time of war, on stopping a vessel, is to make such examination as the circumstances permit at the time, and to release the vessel if there is not probable cause for a fuller examination by the prize tribunal. If the evidence disclosed leaves such well-founded suspicion as would influence a mind of reasonable intelligence and fairness, the duty of the cruiser is to send the vessel into a convenient port of his own country, for such an examination as can only be satisfactorily made in port, and by the means in possession of a prize court. This is considered to be the right of the sovereign as a belligerent; and damages are not awarded because the vessel turns out, on such an investigation, to be exempt from condemnation, as they would be in case of private civil proceedings, but only where the capture and sending-in were without probable cause appearing, upon such examination as could reasonably be required of a cruiser at sea, under the circumstances of the case. The latest, and it is believed most satisfactory, examination of this subject of damages, will be found in the decision of Judge Sprague in the case of the French ship *La Manche* (Sprague's Decisions, ii (1); Law Reporter, xxv. 585).

VI. DUTY OF THE CAPTORS. From the nature and objects of the prize tribunals, it is clear that the captor's duty is to see that his act of capture is submitted to adjudication by the prize court of his country. Of course, he must do this in a reasonable and fair way. He must send in the prize as speedily as possible to a convenient court, in proper hands, and with all the papers, cargo, and other sources of evidence unaltered, and with the master, supercargo (if any), and other chief persons on board, likely to be useful to the owners as witnesses, and to see every thing properly delivered to the court. For a breach of these rules, although the claimant does not suffer, still the captor may lose his prize-money. If there is reason to believe that the misconduct of the captor has been fatal to a fair inquest, the vessel is restored. If damage happens to the vessel or property in the hands of the captors, and the court holds the capture to have been with probable cause, their responsibilities are only those of lawful custodians or bailees; *i.e.*, responsibility for failure to use reasonable care and skill.

After such examination as the commander of the cruiser can make, his duty, as [485] against neutrals, is to decide between two courses: He must either release the vessel absolutely, with her cargo, papers, passengers, and all entire; or he must complete his capture, make her a prize, and send her in for adjudication. He cannot take a middle course, and, releasing the vessel, exercise any belligerent authority over the cargo, passengers, or papers, or destroy any property, or take from her persons or property. If he should take this course, he will be considered as having declined the exercise of the only belligerent right neutral nations permit to him,—that of capture and sending-in for adjudication; and his act of destroying or removing will be treated as not a lawful belligerent proceeding. Not being a recognized belligerent act, it is either, in law, an act of piracy, or an attempt to exercise a police power over neutral vessels on the high seas. This subject received its fullest discussion in the case of the *Trent*. That vessel was a British mail passenger-steamer, and was stopped and examined at sea by the United States war-steamer *San Jacinto*. Commodore Wilkes, commanding the *San Jacinto*, found on board the *Trent* two official persons of the rebel government, who were going to Europe in a public capacity. He released the *Trent*, with the other passengers and papers, but removed these officers to his own vessel, on the ground that they were contraband of war, and brought them as prisoners of war to the United States. The British Government demanded satisfaction. Mr. Seward considered that, by so releasing the *Trent*, Commodore Wilkes lost the right to exercise belligerent rights over her, or over any thing on board; and that the taking out of

[¹ Insert . 207 after ii]—G.G.W.

[482] itself has no right to exercise such a jurisdiction, except in cases where its own neutral jurisdiction and sovereignty have been violated

these official persons was, for that reason, not justifiable as an exercise of belligerent rights. As the government of the United States had always denied and resisted all claims of belligerents to exercise any acts of authority or force over American vessels or any thing on board them, at sea, except the right to stop, examine, and either to release entire, or to send in for adjudication in the manner recognized by nations,—these official persons so taken from her were sent by the United States Government on board a British vessel of war, and by her taken to their original port of destination. (Letter of Mr. Seward to Lord Lyons of Dec. 26, 1861. See further, *The Trent Case*, note *infra*, on Carrying Hostile Persons and Papers.)

Necessity will excuse the captor from the duty of sending in his prize. If the prize is unseaworthy for a voyage to the proper port, or there is impending danger of immediate recapture from an enemy's vessel in sight, or if an infectious disease is on board, or other cause of a controlling character, the law of nations authorizes a destruction or abandonment of the prize, but requires all possible preservation of evidence, in the way of papers and persons on board. And, even if nothing of pecuniary value is saved, it is the right and duty of the captor to proceed for adjudication in such a case, for his own protection and that of his government, and for the satisfaction of neutrals. In the case of the *Trent*, the reason assigned by Commodore Wilkes for not sending his prize in for adjudication was the great inconvenience that would result to the numerous passengers on board, and to the commercial world, as there were mails on board for all parts of Europe which would have to be subjected to delay. This motive, though creditable to the commander in that case, is not recognized by the law of nations as an excuse.

VII. REMEDY OF CLAIMANTS. If the captor does not, in a reasonable time, submit his capture to adjudication, any person interested in the prize may require an [486] adjudication by petition to the prize court for a monition upon the captors, or by a suit for a decree of restitution. This proceeding is applicable to a case of destruction or abandonment of a prize,—for which it is an approved remedy,—as well as to other circumstances. (For remedy of claimants, in the way of damages, in case of restitution, *vide* this note, *supra*.)

VIII. LOCALITY OF THE PRIZE. As it is not necessary to the jurisdiction of a prize court that the prize should be in existence, it would seem to be unnecessary that it should be within its custody. Yet, for a long time, this was a vexed question of international law. Where a prize is not fit for a voyage to a place of adjudication, and yet may be of value, it is customary to sell her. The statutes of the United States assume, that a captor, or any national authority, may sell in a case of necessity, rather than destroy the vessel; and that the government may itself take a prize into its service, in a case of belligerent necessity, or if it is unseaworthy for a voyage to a port of adjudication. (Act 1864, ch. 174, § 28.) In the one case, it is the duty of the captor to send the proceeds of the prize to the prize court, and, in the other, of the government to deposit the value for adjudication, in lieu of the prize itself. (*Ibid.*) It is believed that this practice is sanctioned by the law of nations.

As to a prize in a neutral port, writers seem often to have confounded the duty of the captor with the jurisdiction of the court. The duty of the captor is to send his prize to a port of his own country, that the prize tribunal may have it within its custody, not only for a fairer investigation of evidence,—often derivable from the vessel and cargo itself,—but also to diminish the risks of concealment or destruction, by the captors, of evidence or property, and to insure a fair sale for full value in case of condemnation, or a more speedy and satisfactory restitution. The captor must give some reason of necessity for leaving his prize in a neutral port, or, as before stated, for not bringing it in. But, irrespective of the advantages or disadvantages to claimants or captors, on the bare question of the capacity of the court to take cognizance of a cause where the prize is not bodily in its custody, and yet is in existence, there seems to be now no doubt. (For analogous cases in civil proceedings, see *Hudson v. Guestier*, Cranch, iv. 293; *Ib. vi. 281*; and *Rose v. Himely*, Cranch, iv. 241.) Whether a court will exercise its functions in any given case of an absent prize, is a different question, and one of discretion, upon circumstances.

Whether a prize may or may not be taken into or remain in a neutral port, to await proceedings at home, or for sale by captors, or for any other purpose, is a question for the neutral sovereign to decide. Consular prize courts, in neutral States, are not now recognized by nations. The locality of the court must be in the territory of the belligerent. This was first

by the capture. A sentence of condemnation, pronounced by a belligerent consul in a neutral port, is, therefore, considered as insufficient to transfer the property in vessels or goods captured as prize of war, and carried into such port for adjudication.^(a)¹⁸⁷

Responsi-
bility of the
captor's

[483] § 390. The jurisdiction of the court of the capturing nation

decided politically by Washington's Cabinet, in the case of the prizes taken by M. Genet's privateers (*American State Papers*, i. 144); and judicially by the Supreme Court, in *The Betsey* (Dallas, iii. 6); and, afterwards, by Sir William Scott, in *The Flad Oyen* (Rob. i. 135). It is within the fortunes of war, whether the captor shall be able to get his prize into a home port. It is obviously for the interest of neutrals to require such a course, and to object to all adjudication on absent prizes, except in cases of necessity.

The modern practice of neutrals prohibits the use of their ports by the prizes of a belligerent, except in cases of necessity; and they may remain in the ports only for the meeting of the exigency. The necessity must be one arising from perils of the seas, or [487] need of repairs for seaworthiness, or provisions and supplies. Increase of armament is prohibited. The neutral will protect the prize against pursuit from the same port for twenty-four hours, and against capture within his waters; but, beyond that, the general peril of prizes, arising from the power or vigilance of the other belligerent, does not constitute a necessity which the neutral recognizes as justifying a remaining in his port. This rule, if adhered to, will prevent the arising of a custom of retaining prizes in safety in a neutral port, until they can be condemned in the home port, in their absence. But, apart from any such practice of neutrals, it seems clear, that to allow prizes to fly to a neutral port, and remain there in safety while prize proceedings are going on in a home port, would give occasion to nearly all the objections that exist against prize courts in neutral ports. It seems, therefore, to be the tendency, if not the settled rule, now, that a decree of condemnation will not be passed against prizes remaining abroad, unless in case of necessity, or, if passed, will not be respected by other nations. (*The Polka*, Spink's Adm. Rep. i. 447.) In the list of necessities, the general dangers of a passage, from the vigilance or superiority of the enemy, it would seem, should not be included, although no decision on that precise point is known.

In the civil war in the United States, a question of interest was presented as to the rights of captors. After the first few months, the rebel cruisers made no attempt to send in their prizes, but destroyed them at sea. The justification alleged was the stringent blockade of their ports by the United States. At the same time, merchant-vessels, both rebel and British, were constantly attempting, and often successfully, the breach of blockade at many points. The question was not presented to any court or diplomatically, as the rebel government disappeared. But, in some future war, the question may arise, whether the mere fact of the existence of a blockade of all the ports of a belligerent, making the sending-in a prize a matter of hazard, but such as neutral merchant-vessels run, will justify the continuance of a practice of capturing and destroying. How long may that be kept up by a belligerent whose maritime power is so reduced that he has no port of his own which his cruisers can use? The rebel cruisers continued their work of destruction for three years or more after they had no port that, by their own statement, they could resort to, for any purpose.

Upon the point of rescue of a prize by a neutral crew, see note 183, *ante*.

Upon these points of principle and practice of prize tribunals, which are general and mostly undisputed, consult Story's Notes to first and second volumes of Wheaton's Reports. Kent's Comm. i. 100-104. Halleck's Intern. Law, 748-773; also, 522-3, 531-533, 729, 743. Phillimore's Intern. Law, iii. §§ 361-381, and 437-508. Heffter's Europ. Völker. §§ 171-173. Ortolan, vol. ii. ch. 8, pp. 303-315. De Pistoye et Duverdy, ii. pp. 173, 188. Prize Acts of United States, 1864, ch. 174. British Naval Prize Act of 1864. *The Polka*, Spink's Adm. Rep. i. 447. *Jecker v. Montgomery*, How. xiii. 515. *La Manche*, Sprague's Decisions, ii. ⁽⁴⁾ Law Reporter, xxv. 585. The laws of the United States as to prize proceedings were reviewed and put in a new code, by the statute of 1864, ch. 174, which repealed all prior statutes.—D.

(a) *The Flad Oyen*, Robinson's Adm. Rep. i. 135.

[¹⁸⁷ See the above note, 186, on Prize Jurisdiction.]—D.

[¹ Insert . 207 after ii]—G.G.W.

is conclusive upon the question of property in the captured thing. Its sentence forecloses all controversy respecting the validity of the capture, as between claimant and captors, and those claiming under them, and terminates all ordinary judicial inquiry upon the subject-[484] matter. But where the responsibility of the captors ceases, that of the State begins. It is responsible to other States for the acts of the captors under its commission, the moment these acts are confirmed by the definitive sentence of the tribunals which it has appointed to determine the validity of captures in war.

government
for the acts
of its com-
missioned
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courts.

[485] § 391. Grotius states that a judicial sentence, plainly against right, (*in re minimè dubiâ*), to the prejudice of a foreigner, entitles his nation to obtain reparation by reprisals:—‘For the authority of the judge,’ says he, [486] ‘is not of the same force against strangers as against subjects. Here is the difference: subjects are bound up and concluded by the sentence of the judge, though it be unjust, so that they cannot lawfully oppose its execution, nor by force recover their own right, [487] on account of the controlling efficacy of that authority under which they live. But strangers have coercive power, (that is, of reprisals, of which the author is treating,) though it be not lawful to use it so long as they can obtain their right in the ordinary course of justice.’(a)

Unjust
sentence of
a foreign
court,
ground of
reprisals.

[488] So, also, Bynkershoek, in treating the same subject, puts an unjust judgment upon the same footing with naked violence, in authorizing reprisals on the part of the State whose subjects have been thus injured by the tribunals of another State. And Vattel, in enumerating the different modes in which justice may be refused, so as to authorize reprisals, mentions ‘a judgment manifestly unjust and partial,’ and though he states what is undeniable, that the judgments of the ordinary tribunals ought not to be called in question upon frivolous or doubtful grounds, yet he is manifestly far from attributing to them that sanctity which would absolutely preclude foreigners from seeking redress against them.(b)

These principles are sanctioned by the authority of numerous treaties between the different powers of Europe regulating the subject of reprisals, and declaring that they shall not be granted unless in case of *the denial of justice*. An unjust sentence must certainly be considered a denial of justice, unless the mere privilege of being heard before condemnation is all that is included in the idea of justice.

(a) ‘Quod fieri intelligitur non tantum si in sontem aut debitorem judicium intra tempus idoneum obtineri nequeat, verum etiam si in re minimè dubiâ (nam in dubiâ re præsumptio est pro his qui ad judicia publicè electi sunt) plane contra jus judicatum [488] sit. Nam auctoritas judicantis non idem in exteros quod in subditos valet. . . . Hoc interest, quod subditi executionem etiam injustæ sententiæ vi impedire, aut contra eam jus suum vi exsequi licitè non possunt, ob imperii in ipsos efficaciam: exteri autem jus habent cogendi, sed quo uti non liceat quàm diu per judicium, suum possint obtinere.’ Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 2, § 5, No. 1.

(b) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 24. Vattel, Droit des Gens, liv. ii. ch. 18, § 350.

Distinction
between
municipal
tribunals
and courts
of prize.

§ 392. Even supposing that unjust judgments of municipal tribunals do not form a ground of reprisals, there is evidently a wide distinction in this respect between the ordinary tribunals of the State, proceeding under the municipal law as their rule of decision, and prize tribunals, appointed by its authority, and professing to administer the law of nations to foreigners as well as subjects. The ordinary municipal tribunals acquire jurisdiction over the person or property of a foreigner by his consent, either *expressed* by his voluntarily bringing the suit, or *implied* by the fact of his bringing his person or property within the territory. But when courts of prize exercise their jurisdiction over vessels captured at sea, the property of foreigners is brought by force within the territory of the State by which those tribunals are constituted. By natural law, the tribunals of the captor's country are no more the rightful [489] exclusive judges of captures in war, made on the high seas from under the neutral flag, than are the tribunals of the neutral country. The equality of nations would, on principle, seem to forbid the exercise of a jurisdiction thus acquired by force and violence, and administered by tribunals which cannot be impartial between the litigating parties, because created by the sovereign of the one to judge the other. Such, however, is the actual constitution of the tribunals, in which, by the positive international law, is vested the exclusive jurisdiction of prizes taken in war. But the imperfection of the voluntary law of nations, in its present state, cannot oppose an effectual bar to the claim of a neutral government seeking indemnity for its subjects who have been unjustly deprived of their property, under the erroneous administration of that law. The institution of these tribunals, so far from exempting, or being intended to exempt, the sovereign of the belligerent nation from responsibility for the acts of his commissioned cruisers, is designed to ascertain and fix that responsibility. Those cruisers are responsible only to the sovereign whose commissions they bear. So long as seizures are regularly made upon apparent grounds of just suspicion, and followed by prompt adjudication in the usual mode, and until the acts of the captors are confirmed by the sovereign in the sentences of the tribunals appointed by him to adjudicate in matters of prize, the neutral has no ground of complaint, and what he suffers is the inevitable result of the belligerent right of capture. But the moment the decision of the tribunal of the last resort has been pronounced, (supposing it not to be warranted by the facts of the case, and by the law of nations applied to those facts,) and justice has been thus finally denied, the capture and the condemnation become the acts of the State, for which the sovereign is responsible to the government of the claimant. There is nothing more irregular in maintaining that the sovereign is responsible toward foreign States for the acts of his tribunals, than in maintaining that he is responsible for his own acts,

which, in the intercourse of nations, are constantly made the ground of complaint, of reprisals, and even of war. No greater sanctity can be imputed to the proceedings of prize tribunals, even by the most extravagant theory of the conclusiveness of their sentences, than is justly attributed to the acts of the sovereign himself. But those acts, however binding upon his own subjects, if they are not conformable to the public law of the world, cannot be considered [490] as binding upon the subjects of other States. A wrong done to them forms an equally just subject of complaint on the part of their government, whether it proceeds from the direct agency of the sovereign himself, or is inflicted by the instrumentality of his tribunals. The tribunals of a State are but a part, and only a subordinate part, of the government of that State. But the right of redress against injurious acts of the whole government, of the supreme authority, incontestably exists in foreign States, whose subjects have suffered by those acts. Much more clearly then must it exist, when those acts proceed from persons, authorities, or tribunals, responsible to their own sovereign, but irresponsible to a foreign government, otherwise than by its action on their sovereign.

These principles, so reasonable in themselves, are also supported by the authority of the writers on public law, and by historical examples.

§ 393.⁽¹⁾ 'The exclusive right of the State, to which the captors belong, to adjudicate upon the captures made by them,' says Rutherford, 'is founded upon another; that is, its right to inspect into the conduct of the captors, both because they are members of it, and because it is responsible to all other States for what they do in war; since what they do in war is done either under its general or its special commission. The captors are therefore obliged, on account of the jurisdiction which the State has over their persons, to bring such ships or goods as they seize in the main ocean into their own ports, and they cannot acquire property in them until the State has determined whether they were lawfully taken or not. The right which their own State has to determine this matter is so far an exclusive one, that no other State can claim to judge of their conduct until it has been thoroughly examined into by their own; both because no other State has jurisdiction over their persons, and likewise because no other State is answerable for what they do. But the State to which the captors belong, whilst it is thus examining into the conduct of its own members, and deciding whether the ships or goods which they have seized are lawfully taken or not, is determining a question between its own members and the foreigners who claim the property; and this controversy did not arise within its own territory, but in the main ocean. The right, therefore, which it exercises is not civil jurisdiction; and the civil law which is peculiar to its own [491] territory, is not the law by which it

Opinion of
Rutherford.

[¹ § 393 is not an exact quotation; some clauses and sentences are omitted.]—G.G.W.

ought to proceed. Neither the place where the controversy arose, nor the parties who are concerned in it, are subject to this law. The only law by which this controversy can be determined, is the law of nature, applied to the collective bodies of civil societies, that is, the law of nations; unless, indeed, there have been any particular treaties made between the two States, to which the captors and the other claimants belong, mutually binding them to depart from such rights as the law of nations would otherwise have supported. Where such treaties have been made, they are a law to the two States, as far as they extend, and to all the members of them, in their intercourse with one another. The State, therefore, to which the captors belong, in determining what might or might not be lawfully taken, is to judge by these particular treaties, and by the law of nations taken together. This right of the State, to which the captors belong, to judge exclusively, is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons. But the other parties to the controversy, as they are members of another State, are only bound to submit to its sentence so far as this sentence is agreeable to the law of nations, or to particular treaties; because it has no jurisdiction over them, either in respect of their persons, or of the things that are the subject of the controversy. If justice, therefore, is not done to them, they may apply to their own State for a remedy; which may, consistently with the law of nations, give them a remedy, either by solemn war or reprisals. In order to determine when their right to apply to their own State begins, we must inquire when the exclusive right of the other State to judge in this controversy ends. As this exclusive right is nothing else but the right of the State, to which the captors belong, to examine into the conduct of its own members before it becomes answerable for what they have done, such exclusive right cannot end until their conduct has been thoroughly examined. Natural equity will not allow that the State should be answerable for their acts, until those acts are examined by all the ways which the State has appointed for this purpose. Since, therefore, it is usual in maritime countries to establish not only inferior courts of marine, to judge what is and what is not lawful prize, but likewise superior courts of review, to which the parties may appeal, if they think themselves [492] aggrieved by the inferior courts; the subjects of a neutral State can have no right to apply to their own State for a remedy against an erroneous sentence of an inferior court, till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the State, to which the captors belong, to examine into their conduct; and, till their con-

duct has been examined by all these means, the State's exclusive right of judging continues. After the sentence of the inferior court has been thus confirmed, the foreign claimants may apply to their own State, for a remedy, if they think themselves aggrieved; but the law of nations will not entitle them to a remedy, unless they have been actually aggrieved. When the matter is carried thus far, the two States become the parties in the controversy. And since the law of nature, whether it is applied to individuals or civil societies, abhors the use of force till force becomes necessary, the supreme rulers of the neutral State, before they proceed to solemn war or to reprisals, ought to apply to the supreme rulers of the other State, both to satisfy themselves that they have been rightly informed, and likewise to try whether the controversy cannot be adjusted by more gentle methods.'(a)

§ 394. In the celebrated report made to the British government, in 1753, upon the case of the reprisals granted by the King of Prussia, on account of captures made by the cruisers of Great Britain of the property of his subjects, the exclusive jurisdiction of the captor's country over captures made in war, by its commissioned cruisers, is asserted; and it is laid down that 'the law of nations, founded upon justice, equity, convenience, and the reason of the thing, does not allow of reprisals, except in case of violent injuries, directed or supported by the State, and justice absolutely denied *in re minimè dubiâ*, by all the tribunals, and afterwards by the prince;' plainly showing that, in the opinion of the eminent persons by whom that paper was drawn up, if justice be denied in a clear case, by all the tribunals, and afterwards by the prince, it forms a lawful ground of reprisals against the nation by whose commissioned cruisers and tribunals the injury is committed. And that Vattel was of the [493] same opinion, is evident from the manner in which he quotes this paper to support his own doctrine, that the sentences of the tribunals ought not to be made the ground of complaint by the State against whose subjects they are pronounced, '*excepting* the case of a refusal of justice, palpable and evident injustice, a manifest violation of rules and forms,' &c.(a)

In the case above referred to, the King of Prussia (then neutral) had undertaken to set up within his own dominions a commission to re-examine the sentences pronounced against his subjects in the British prize courts; a conduct which is treated by the authors of the report to the British government as an innovation, 'which⁽¹⁾ was never attempted in any country of the world before. Prize or no⁽¹¹⁾ prize must be determined by courts of admiralty belonging to the power whose subjects

The report
on the Sil-
sian Loan
causes.

(a) Rutherford's Inst. vol. ii. b. ii. ch. 9, § 19.

(a) Vattel, Droit des Gens, liv. ii. ch. 7, § 84.

[¹ For which read it.]—G.G.W.

[¹¹ For no read not.]—G.G.W.

made the capture.' But the report proceeds to state, that 'every foreign prince in amity has a right to demand that justice shall be done to his subjects in these courts, according to the law of nations, or particular treaties, where they are subsisting. If *in re minimè dubiâ*, these courts proceed upon foundations directly opposite to the law of nations, or subsisting treaties, the neutral State has a right to complain of such determination.'

The King of Prussia did complain of the determination of the British tribunals, and made reprisals by stopping the interest upon a loan due to British subjects, and secured by hypothecation upon the revenues of Silesia, until he actually obtained from the British government an indemnity for the Prussian vessels unjustly captured and condemned. The proceedings of the British tribunals, though they were asserted by the British government to be the only legitimate mode of determining the validity of captures made in war, were not considered as excluding the demand of Prussia for redress upon the government itself.(b)

The mixed
commission
between the
United
States and
Great Britain,
under the
treaty of
1794.

§ 395. So, also, under the treaty of 1794, between the United States and Great Britain, a mixed commission was appointed to determine the claim of American citizens, arising from the capture of their property by British cruisers, during the existing war with France, according to justice, equity, and the law of nations. In the course of the proceedings of this board, objections were made, on the part of the British government, against the commissioners proceed[494]ing to hear and determine any case where the sentence of condemnation had been affirmed by the Lords of Appeal in Prize Causes, upon the ground that full and entire credit was to be given to their final sentence; inasmuch as, according to the general law of nations, it was to be presumed that justice had been administered by this, the competent and supreme tribunal in matters of prize. But this objection was overruled by the board, upon the grounds and principles already stated, and a full and satisfactory indemnity was awarded in many cases where there had been a final sentence of condemnation.

Conclusive-
ness of prize
decisions,
continued.

§ 396. Many other instances might be mentioned of arrangements between States, by which mixed commissions have been appointed to hear and determine the claims of the subjects of neutral powers, arising out of captures in war, not for the purpose of revising the sentences of the competent courts of prize, as between the captors and captured, but for the purpose of providing an adequate indemnity between State and State, in cases where satisfactory compensation had not been received in the ordinary course of justice. Although the theory of public law treats prize tribunals, established by and sitting in the belligerent country, exactly as if they were established by and sitting in the neutral

(b) Wheaton's Hist. Law of Nations, 206-217.

country, and as if they always adjudicated conformably to the international law common to both; yet it is well known that, in practice, such tribunals do take for their guide the prize ordinances and instructions issued by the belligerent sovereign, without stopping to inquire whether they are consistent with the paramount rule. If, therefore, the final sentences of these tribunals were to be considered as absolutely conclusive, so as to preclude all inquiry into their merits, the obvious consequence would be to invest the belligerent State with legislative power over the rights of neutrals, and to prevent them from showing that the ordinances and instructions, under which the sentences have been pronounced, are repugnant to that law by which foreigners alone are bound.

§ 397. These principles have received recent confirmation in the negotiation between the American and Danish governments respecting the captures of American vessels and cargoes made by the cruisers of Denmark during the last war between that power and Great Britain. In the course of this negotiation, it was objected by the Danish ministers that the [495] validity of these captures had been finally determined in the competent prize court of the belligerent country, and could not be again drawn in question. On the part of the American government, it was admitted that the jurisdiction of the tribunals of the capturing nation was exclusive and complete upon the question of prize or no prize, so as to transfer the property in the things condemned from the original owner to the captors, or those claiming under them; that the final sentence of those tribunals is conclusive as to the change of property operated by it, and cannot be again incidentally drawn in question in any other judicial forum; and that it has the effect of closing for ever all private controversy between the captors and the captured. The demand which the United States made upon the Danish government was not for a judicial revision and reversal of the sentences pronounced by its tribunals, but for the indemnity to which the American citizens were entitled in consequence of the denial in justice by the tribunals in the last resort, and of the responsibility thus incurred by the Danish government for the acts of its cruisers and tribunals. The Danish government was, of course, free to adopt any measures it might think proper, to satisfy itself of the injustice of those sentences, one of the most natural of which would be a re-examination and discussion of the cases complained of, conducted by an impartial tribunal under the sanction of the two governments, not for the purpose of disturbing the question of title to the specific property which had been irrevocably condemned, or of reviving the controversy between the individual captors and claimants which had been for ever terminated, but for the purpose of determining between government and government whether injustice had been done by the tribunals of

Danish
indemnities
under treaty
of 28th
March, 1830.

one power against the citizens of the other, and of determining what indemnity ought to be granted to the latter.

The accuracy of this distinction was acquiesced in by the Danish ministers, and a treaty concluded, by which a satisfactory indemnity was provided for the American claimants.^(a)

Title to real
property,
how trans-
ferred in war.
*Jus post-
liminii.*

§ 398. We have seen that a firm possession, or the sentence of a competent court, is sufficient to confirm the captor's title to personal property or movables taken in war. A different rule is applied to real property, or immovables. The original owner of this species of prop-
[496]erty is entitled to what is called the benefit of postliminy, and the title acquired in war must be confirmed by a treaty of peace before it can be considered as completely valid. This rule cannot be frequently applied to the case of mere private property, which by the general usage of modern nations is exempt from confiscation. It only becomes practically important in questions arising out of alienation of real property, belonging to the government, made by the opposite belligerent, while in the military occupation of the country. Such a title must be expressly confirmed by the treaty of peace, or by the general operation of the cession of territory made by the enemy in such treaty. Until such confirmation, it continues liable to be divested by the *jus postliminii*. The purchaser of any portion of the national domain takes it at the peril of being evicted by the original sovereign owner when he is restored to the possession of his dominions.^(a)¹⁸⁸

Good faith
towards
enemies.

§ 399. Grotius has devoted a whole chapter of his great work to prove, by the consenting testimony of all ages and nations, that good faith ought to be observed towards an enemy. And even Bynkershoek, who holds that every other sort of fraud may be practised towards him, prohibits perfidy, upon the ground that his character of enemy ceases by the compact with him, so far as the terms of that compact extend. 'I allow of any kind of deceit,' says he, 'perfidy alone excepted, not because any thing is unlawful against an enemy, but because when our faith has been pledged to him, so far as the promise extends, he ceases to be an enemy.' Indeed, without this mitigation, the horrors of war would be indefinite in extent and interminable in duration. The usage of civilized nations has therefore introduced certain *commercii belli*, by

(a) Martens, Nouveau Recueil, tom. viii. p. 350.

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 4; cap. 9, § 13. Vattel, Droit des Gens, liv. iii. ch. 13, §§ 197-200, 210, ⁽¹⁾ 212. Klüber, Droit des Gens Moderne de l'Europe, §§ 256-258. Martens, Précis, &c., liv. viii. ch. 4, § 282 a. Where the case of conquest is complicated with that of civil revolution, and a change of internal government recognized by the nation itself and by foreign States, a modification of the rule may be required in its practical application. *Vide ante*, § 27.

^[188] See note 169, *ante*, on Conquest and Belligerent Occupation. See also Heffter, Europ. Völker. § 188. Woolsey's Introd. § 145. Halleck's Intern. Law, 789, 790, 805, 836-9, 865-870. Phillimore's Intern. Law, iii. 652, 682, 726, 737.]—D.

[¹ Insert ch. 14 after §§ 197-200.]—G.G.W.

which the violence of war may be allayed, so far as is consistent with its objects and purposes, and something of a pacific intercourse may be kept up, [497] which may lead, in time, to an adjustment of differences, and ultimately to peace.(a)¹⁸⁹

§ 400. There are various modes in which the extreme rigor of the rights of war may be relaxed at the pleasure of the respective belligerent parties. Among these is that of a suspension of hostilities, by means of a truce or armistice. This may be either general or special. If it be general in its application to all hostilities in every place, and is to endure for a very long or indefinite period, it amounts in effect to a temporary peace,¹⁹⁰ except that it leaves undecided the controversy in which the war originated. Such were the truces formerly concluded between the Christian powers and the Turks. Such, too, was the armistice concluded, in 1609, between Spain and her revolted provinces in the Netherlands. A partial truce is limited to certain places, such as the suspension of hostilities, which may take place between two contending armies, or between a besieged fortress and the army by which it is invested.(a)¹⁹¹

§ 401. The power to conclude a universal armistice or suspension of hostilities is not necessarily implied in the ordinary official authority of the general or admiral commanding in chief the military or naval forces of the State. The conclusion of such a general truce requires either the previous special authority of the supreme power of the State, or a subsequent ratification by such power.(a)¹⁹²

A partial truce or limited suspension of hostilities may be concluded between the military and naval officers of the respective [498] belligerent States, without any special authority for that purpose, where, from the nature and extent of their commands, such an authority is necessarily implied as essential to the fulfilment of their official duties.(b)

§ 402. A suspension of hostilities binds the contracting parties, and all acting immediately under their direction, from the time it is

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. i. The Daifje,⁽¹⁾ Robinson's Adm. Rep. iii. 139.

[¹⁸⁹ Halleck's Intern. Law, 652. Heffter, Europ. Völker. § 141. Phillimore's Intern. Law, iii. § 97 *et seq.* Martens, Droit des Gens, § 290.]—D.

[¹⁹⁰ Rutherford says that the phrase 'temporary peace,' in this connection, refers to acts of war, and not to a state of war. Ch. 9, § 22.]—D.

(a) Vattel, Droit des Gens, liv. iii. ch. 16, § 235, 236.

[¹⁹¹ Halleck (p. 654) calls a cessation of hostilities for a very short period and a temporary purpose—as for burying the dead, recovering the wounded, and the like—a *suspension of arms*; reserving the phrase 'truce' or 'armistice' to cases of longer continuance, and for a more general or remote purpose.]—D.

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 22, § 8, Barbeyrac's note. Vattel, Droit des Gens, liv. iii. ch. 16, §§ 233-238.

[¹⁹² Kent's Comm. i. 159. See Halleck's Intern. Law, 655, as to the case of California, under the truce in the Mexican war, in 1848. Ex. Doc. 31st. Cong. No. 17, p. 601.]—D.

(b) *Vide ante*, §§ 254, 255.

[¹ For Daifje read Daifjie.]—G.G.W.

concluded; but it must be duly promulgated in order to have a force of legal obligation with regard to the other subjects of the belligerent States; so that if, before such notification, they have committed any act of hostility, they are not personally responsible, unless their ignorance be imputable to their own fault or negligence. But as the supreme power of the State is bound to fulfil its own engagements, or those made by its authority, express or implied, the government of the captor is bound, in the case of a suspension of hostilities by sea, to restore all prizes made in contravention of the armistice. To prevent the disputes and difficulties arising from such questions, it is usual to stipulate in the convention of armistice, as in treaties of peace, a prospective period within which hostilities are to cease, with a due regard to the situation and distance of places.^(a)¹⁹³

Rules for
interpreting
conventions
of truce.

§ 403. Besides the general maxims applicable to the interpretation of all international compacts, there are some rules peculiarly applicable to conventions for the suspension of hostilities. The *first* of these peculiar rules, as laid down by Vattel, is that each party may do within his own territory, or within the limits prescribed by the armistice, whatever he could do in time of peace. Thus either of the belligerent parties may levy and march troops, collect provisions and other munitions of war, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged.

The *second* rule is, that neither party can take advantage of the truce to execute, without peril to himself, what the continuance of hostilities might have disabled him from doing. Such an act would be a fraudulent violation of the armistice. For example:— [499] in the case of a truce between the commander of a fortified town and the army besieging it, neither party is at liberty to continue works, constructed either for attack or defence, or to erect new fortifications for such purposes. Nor can the garrison avail itself of the truce to introduce provisions or succors into the town, through the passages or in any other manner which the besieging army would have been competent to obstruct and prevent, had hostilities not been interrupted by the armistice.

The *third* rule stated by Vattel, is rather a corollary from the preceding rules than a distinct principle capable of any separate application. As the truce merely suspends hostilities without terminating the war, all things are to remain in their antecedent state in the places, the possession of which was specially contested at the time of the conclusion of the armistice.^(a)

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 21, § 5. Vattel, Droit des Gens, liv. iii. ch. 16, § 239.

[¹⁹³ Halleck's Intern. Law, 656. Kent's Comm. i. 160. Rutherford, b. 2, ch. 9, § 22. Phillimore's Intern. Law, iii. § 116. Heffter, Europ. Völker. § 142.]—D.

(a) Vattel, Droit des Gens, liv. iii. ch. 16, §§ 245–251.

It is obvious that the contracting parties may, by express compact, derogate in any and every respect from these general conditions.¹⁹⁴

§ 404. At the expiration of the period stipulated in the truce, hostilities recommence as a matter of course, without any new declaration of war. But if the truce has been concluded for an indefinite, or for a very long period, good faith and humanity concur in requiring previous notice to be given to the enemy of an intention to terminate what he may justly regard as equivalent to a treaty of peace. Such was the duty inculcated by the Fecial college upon the Romans, at the expiration of a long truce which they had made with the people of Veii. That people had recommenced hostilities before the expiration of the time limited in the truce. Still it was held necessary for the Romans to send heralds and demand satisfaction before renewing the war.(a)

Recommencement of hostilities on the expiration of truce.

§ 405. Capitulations for the surrender of troops, fortresses, and particular districts of country, fall naturally within the scope of the general powers intrusted to military and naval commanders. Stipulations between the [500] governor of a besieged place, and the general or admiral commanding the forces by which it is invested, if necessarily connected with the surrender, do not require the subsequent sanction of their respective sovereigns. Such are the usual stipulations for the security of the religion and privileges of the inhabitants, that the garrison shall not bear arms against the conquerors for a limited period, and other like clauses properly incident to the particular nature of the transaction. But if the commander of the fortified town undertake to stipulate for the perpetual cession of that place, or enter into other engagements not fairly within the scope of his implied authority, his promise amounts to a mere *sponsion*.(a)

Capitulations for the surrender of troops and fortresses.

§ 406. The celebrated convention made by the Roman consuls with the Samnites, at the Caudine Forks, was of this nature. The conduct of the Roman senate in disavowing this ignominious compact, is approved by Grotius and Vattel, who hold that the Samnites were not entitled to be placed *in statu quo*, because they must have known that the Roman consuls were wholly unauthorized to make such a convention. This consideration seems sufficient to justify the Romans in acting on this occasion according to their uniform uncompromising policy, by delivering up to the Samnites the authors of the treaty, and persevering in the war until this formidable enemy was finally subjugated.(a)

The convention of the Caudine Forks.

[¹⁹⁴ For a full treatment of this subject in detail, see Halleck's Intern. Law, 657-660. See also Phillimore's Intern. Law, iii. §§ 117, 118, 197-8. Kent's Comm. i. 16, 160. Heffter, Europ. Völker. § 142-3. Martens, Précis du Droit des Gens, §§ 293-4. Wildman's Intern. Law, ii. 27. See also Instructions to the Armies of the United States, April 24, 1863, General Order No. 100, §§ 135-147.]—D.

(a) Liv. Hist. lib. iv. cap. 30. As to the laws of war observed by the Romans, see Wheaton's Hist. Law of Nations, 20-25.

(a) *Vide ante*, § 255.

(a) See the account given by Livy of this remarkable transaction.

The armistice of Closter-Seven.

§ 407. The convention concluded at Closter-Seven, during the seven years' war, between the Duke of Cumberland, commander of the British forces in Hanover, and Marshal Richelieu, commanding the French army, for a suspension of arms in the north of Germany, is one of the most remarkable treaties of this kind recorded in modern history. It does not appear, from the discussions which took place between the two governments on this occasion, that there was any disagreement between them as to the true principles of international law applicable to such transactions. The conduct, if not the language of both parties, implies a mutual admission that the convention was of a nature to require ratification, as exceeding the ordinary powers of military commanders in respect to mere military capitulations. The same remark may be applied to the convention [501] signed at El Arish, in 1800, for the evacuation of Egypt by the French army; although the position of the two governments, as to the convention of Closter-Seven, was reversed in that of El Arish, the British government refusing in the first instance to permit the execution of the latter treaty upon the ground of the defect in Sir Sidney Smith's powers, and, after the battle of Heliopolis, insisting upon its being performed by the French, when circumstances had varied and rendered its execution no longer consistent with their policy and interest. Good faith may have characterized the conduct of the British government in this instance, as was strenuously insisted by ministers in the parliamentary discussions to which the treaty gave rise, but there is at least no evidence of perfidy on the part of General Kleber. His conduct may rather be compared with that of the Duke of Cumberland at Closter-Seven, (and it certainly will not suffer by the comparison,) in concluding a convention suited to existing circumstances, which it was plainly his interest to carry into effect when it was signed, and afterwards refusing to abide by it when those circumstances were materially changed. In these compacts, time is material: indeed it may be said to be of the very essence of the contract. If any thing occurs to render its immediate execution impracticable, it becomes of no effect, or at least is subject to be varied by fresh negotiation.^(a)¹⁹⁵

Passports, safe-conducts, and licenses.

§ 408. Passports, safe-conducts, and licenses, are documents granted in war to protect persons and property from the general operation of hostilities. The competency of the authority to issue them depends on the general principles already noticed. This sovereign authority may be vested in military and naval commanders, or in

(a) Flassan, *Histoire de la Diplomatie Française*, tom. vi. pp. 97-107. *Annual Register*, i. 209-213, 228-234; xlii. [219], 223-233, *State Papers*; vol. xliii. [28-34].

[¹⁹⁵ For detailed statement of the rules and effects of agreements for capitulation and other terms, see Halleck's *Intern. Law*, 660-662. For the rules adopted by the United States in the civil war, in respect to armistice and capitulation, see *Instructions to the Armies*, of April 24, 1863, General Order No. 100, § 8.]—D.

certain civil officers, either expressly, or by inevitable implication from the nature and extent of their general trust. Such documents are to be interpreted by the same rules of liberality and good faith with other acts of the sovereign power.^(a)¹⁹⁶

[502] § 409. Thus a license granted by the belligerent State to its own subjects, or to the subjects of its enemy, to carry on a trade interdicted by war, operates as a dispensation with the laws of war, so far as its terms can be fairly construed to extend. The adverse belligerent party may justly consider such documents of protection as *per se* a ground of capture and confiscation; but the maritime tribunals of the State, under whose authority they are issued, are bound to consider them as lawful relaxations of the ordinary state of war. A license is an act proceeding from the sovereign authority of the State, which alone is competent to decide on all the considerations of political and commercial expediency, by which such an exception from the ordinary consequences of war must be controlled. Licenses, being high acts of sovereignty, are necessarily *stricti juris*, and must not be carried further than the intention of the authority which grants them may be supposed to extend. Not that they are to be construed with pedantic accuracy, or that every small deviation should be held to vitiate their fair effect. An excess in the quantity of goods permitted might not be considered as noxious to any extent, but a variation in their quality or substance might be more significant, because a liberty assumed of importing one species of goods, under a license to import another, might lead to very dangerous consequences. The limitations of time, persons, and places, specified in the license, are also material. The great principle in these cases is, that subjects are not to trade with the enemy, nor the enemy's subjects with the belligerent State, without special permission of the government; and a material object of the control which the government exercises over such a trade is, that it may judge of the fitness of the persons, and under what restrictions of time and place such an exemption from the ordinary laws of war may be extended. Such are the general principles laid down by Sir W. Scott for the interpretation of these documents; but Grotius lays down the general rule, that safe-conducts, of which these licenses are a species, are to be liberally construed; *laxa quàm stricta interpretatio admittenda est*. And during the last war, licenses were eventually interpreted with great liberality in the British Courts of Prize.^(a)¹⁹⁷

Licenses
to trade with
the enemy.

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 21, § 14. Vattel, Droit des Gens, liv. iii. ch. 17, §§ 265-277.

[¹⁹⁶ Halleck's Intern. Law, 664-8. Kent's Comm. i. 162-3. Phillimore's Intern. Law, iii. § 101. Heffter, Europ. Völker. § 142. U. S. Laws, i. 118. U. S. Army Regulations, 1857, § 769-773. Instructions to the Armies of the United States, April 24, 1863, § 6.]—D.

(a) Chitty's Law of Nations, ch. 7. Kent's Comm. i. 163, note b.

[¹⁹⁷ See note 198, *infra*, on License to Trade with the Enemy.]—D.

Authority
to grant
licenses.

[503] § 410. It was made a question in some cases in those courts, how far these documents could protect against British capture, on account of the nature and extent of the authority of the persons by whom they were issued. The leading case on this subject is that of *The Hope*, an American ship, laden with corn and flour, captured whilst proceeding from the United States to the ports of the Peninsula occupied by the British troops, and claimed as protected by an instrument granted by the British consul at Boston, accompanied by a certified copy of a letter from the admiral on the Halifax station. In pronouncing judgment in this case, Sir W. Scott observed, that the instrument of protection, in order to be effectual, must come from those who have a competent authority to grant such a protection, but that the papers in question came from persons who were vested with no such authority. To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority; if at any time delegated to persons in a subordinate station, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are called *mandatories*; or by persons in whom such a power is vested in virtue of any situation to which it may be considered incidental. It was quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. *Ei rei non præponitur*, and, therefore, his acts in relation to it are not binding. Neither does the admiral, on any station, possess such authority. He has, indeed, power relative to the ships under his immediate command, and can restrain them from committing acts of hostility; but he cannot go beyond that; he cannot grant a safeguard of this kind beyond the limits of his own station. The protections, therefore, which had been set up did not result from any power incidental to the situation of the persons by whom they had been granted; and it was not pretended that any such power was specially intrusted to them for the particular occasion. If the instruments which had been relied upon by the claimants were to be considered as the naked acts of those persons, then they were, in every point of view, totally invalid. But the question was, whether the British government had taken any steps to ratify these proceedings, and thus to convert them into valid acts of state; for persons not having full power may make what in law are termed *sponsiones*, or, in diplomatic language, [504] treaties *sub spe rati*, to which a subsequent ratification may give validity: *ratihabitio mandato æquiparatur*. The learned judge proceeded to show, that the British government had confirmed the acts of its officers, by the Order in Council of the 26th October, 1813, and accordingly decreed restitution of the property. In the case of *The Reward*, before the Lords of Appeal, the principle of this judgment was substantially confirmed; but in that of *The Charles*, and

other similar cases, where certificates or passports of the same kind, signed by Admiral Sawyer, and also by the Spanish minister in the United States, had been used for voyages from thence to the Spanish West Indies, the Lords of Appeal held that these documents, not being included within the terms of the confirmatory Order in Council, did not afford protection. In the cases of passports granted by the British minister in the United States, permitting American vessels to sail with provisions from thence to the island of St. Bartholomew, but not confirmed by an Order in Council, the Lords condemned in all the cases not expressly included within the terms of the Order in Council, by which certain descriptions of licenses granted by the minister had been confirmed. (a)¹⁹⁸

(a) *The Hope*, Dodson's Adm. Rep. i. 226. Ibid. Appendix D. Stewart's Vice-Adm. Rep. 367.

[¹⁹⁸ *License to Trade with the Enemy*.—A license to trade with the enemy must be issued by competent authority, without material misrepresentation, whether intentional or not, on the part of the receiver, and used in good faith, strictly according to its terms. An error, though without fraud, may vitiate it. It is always ultimately from sovereign authority. The only question is, what authority the sovereign expressly or impliedly grants to a subordinate commander. It is understood that a commander may grant special licenses within his department, but not licenses general in respect of time or place.

As to the Persons. The person named in the license may be either a principal or an agent; but, if he is described as principal, he cannot protect property for which he is agent. If no person is named or implied, it is presumed to be negotiable, and the subject of sale.

As to the Vessel. There must be a substantial compliance with any statement of nationality of the vessel to be used. An enemy's vessel cannot be used, unless expressly permitted; nor a vessel of the grantor's nation, if neutral vessels only are named. Still, as substantial compliance is sufficient, where the nationality of the neutral vessel, or the number of the vessels of one flag, is not material, a departure in that particular, in good faith and from necessity or great convenience, is not fatal.

As to Cargo. A liberal construction has been put upon this subject in cases of good faith and necessity. But the pressure of hostile powers is never regarded as a justifying necessity, as that would open a door to fraud. A change of the quantity or quality of the goods, or substitution in case of loss, if not making a material variation, is permitted. So the going or returning in ballast may be implied, or the [505] returning full, where unloading becomes impossible. If unprotected goods are on board, by accident or mistaken interpretation, they are condemned; but the license is not rendered void, unless it has been perverted intentionally for the purpose of carrying such goods.

The Course of the Voyage. On this, the greatest strictness is required. The rules laid down do not vary much from those applied to policies of insurance for described voyages. An intentional deviation forfeits the license, but not a mere intent, the execution of which is not entered upon, unless it shall, in fact, have produced some effect on the voyage. The requirement to visit certain ports for convoy or other purpose, whether the purpose be expressed or not, must be complied with. These visits are guaranties of good faith, and also enable the grantor to inspect the vessel.

As to Time. Time is usually of the essence of the license. In case of a license to export from a port of the grantor, the time is a condition that must be complied with, or the license does not take effect. In case of a license to import from an enemy's country, allowance will be made for circumstances beyond the control of the licensee.

A license gives no right to visit a permitted port, if under blockade, or to carry contraband goods, papers, or persons, or to resist search.

Halleck, 675-690. Manning, § 123.⁽¹⁾ Wildman, ii. 245-266. Kent's Comm. i. 163. Duer on Insurance, i. 594-619. Hautefeuille, tom. i. p. 19. Woolsey, § 147. Phillimore's Intern. Law, iii. 249, 613.]—D.

[¹ For § 123 read p. 123.]—G.G.W.

Ransom
of captured
property.

[505] § 411. The contract made for the ransom of enemy's property, taken at sea, is generally carried into effect by means of a safe-conduct granted by the captors, permitting the captured vessel and cargo to proceed to a designated port, within a limited time. Unless prohibited by the law of the captor's own country, this document furnishes a complete legal protection against the cruisers of the same nation, or its allies, during the period, and within the geographical limits, prescribed by its terms. This protection results from the general authority to capture, which is delegated by the belligerent State to its commissioned cruisers, and which involves the power to ransom captured property, when judged advantageous. If the ransomed vessel is lost by the perils of the sea, before her arrival, the obligation to pay the sum stipulated for her ransom is not thereby extinguished. The captor guaranties the captured vessel against being interrupted in its course, or retaken, by other cruisers of his nation, or its allies, but he does not insure against losses by the perils of the seas. Even where it is expressly agreed that the loss of the vessel by these perils shall discharge the captured from the payment of the ransom, this clause is restrained to the case of a total loss on the high seas, and is not extended to shipwreck or stranding, which might afford the master a temptation fraudulently to cast away his vessel, in order to save the most valuable part of the [506] cargo, and avoid the payment of the ransom. Where the ransomed vessel, having exceeded the time or deviated from the course prescribed by the ransom-bill, is retaken, the debtors of the ransom are discharged from their obligation, which is merged in the prize, and the amount is deducted from the net proceeds thereof, and paid to the first captor, whilst the residue is paid to the second captor. So, if the captor, after having ransomed a vessel belonging to the enemy, is himself taken by the enemy, together with the ransom-bill, of which he is the bearer, this ransom-bill becomes a part of the capture made by the enemy; and the persons of the hostile nation who were debtors of the ransom are thereby discharged from their obligation. The death of the hostage taken for the faithful performance of the contract on the part of the captured, does not discharge the contract; for the captor trusts to him as a collateral security only, and, by losing it, does not also lose his original security, unless there is an express agreement to that effect.^(a)¹⁹⁹

(a) Pothier, *Traité de Propriété*, Nos. 134-137. Valin, sur l'Ordonnance, liv. iii. tit. 9; des Prises, art. 19. *Traité des Prises*, ch. 11, Nos. 1-3.⁽¹⁾

¹⁹⁹ *Ransom*. Ransoms were prohibited by Acts of Parliament of Great Britain from and after the time of George III, as tending to relax the energies of war by depriving cruisers of the chance of recapturing prizes. The Act of 1804 (§ 45) leaves the subject in the hands of the Queen in Council, to prohibit or allow ransoms, wholly or in certain cases, and absolutely or subject to terms and conditions, in any pending war; and gives jurisdiction over ransom

[¹ For Nos. 1-3 read secs. 1-3.]—G.G.W.

[507] Sir William Scott states, in the case of *The Hoop*, that, as to ransoms, which are contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in the British courts of justice in his own proper person for the payment of the ransom, even before British subjects were prohibited by the statute 22 Geo. III. cap. 25, from ransoming enemy's property; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. But the effect of such a contract, like that of every other which may be lawfully entered into between belligerents, is to suspend the character of enemy, so far as respects the parties to the ransom-bill; and, consequently, the technical objection of the want of a *persona standi in judicio* cannot, on principle, prevent a suit being brought by the captor, directly on the ransom-bill. And this appears to be the practice in the maritime courts of the European continent.^(b)²⁰⁰

agreements exclusively to the Court of Admiralty as a prize Court. It punishes by fine any person who gives a ransom in violation of Orders in Council. Other maritime nations, including the United States, have admitted them among the *commercii belli*. (Halleck's Intern. Law, 670. Kent's Comm. i. 105. Phillimore's Intern. Law, iii. § 433.^[1] Pothier, De Propriété, No. 144. Bello, Derecho Intern. p. 2,^[11] ch. 5, § 9.) Ransom bills, and the safe-conducts given to effectuate ransoms, are binding on the allies of both parties to the contract. (Kent's Comm. i. 105. Phillimore's Intern. Law, iii. § 110. De Cussy, Droit Maritime, liv. i. tit. 2, § 29. Halleck's Intern. Law, 671.) If, as is sometimes the case, the captor agrees that the parties to the bill shall be discharged in case of loss of the vessel by perils of the seas, that includes only total loss on the high seas, and not loss by stranding. (Pothier, Traité du Droit de Propriété, No. 138. Halleck's Intern. Law, 672. Kent's Comm. i. 105.) The English courts, when ransoms were permitted, held that an enemy cannot sue on a ransom bill, during the war, for want of a *persona standi*; Lord Mansfield dissenting from the majority of the court, and holding that the contract of ransom, if allowed to a subject by the State, is an implied suspension of the disability to sue, so far as remedies on that contract are concerned. (Anthon v. Fisher, note to Douglas's Rep. 526.^[111]) Lord Mansfield's ground is generally approved by the later jurists, and the objection does not obtain in other countries. (Halleck's Intern. Law, 674. Story, J., in *Maissonniere*^[iv] v. Keating, Gallison, ii. 337. Kent's Comm. i. 68, 104-108. Ricord v. Bettenham, Burrow, iii. 1734. Pothier, De Propriété, No. 144.) On the subject of ransom generally, see Judge Story's opinion in *Maissonniere*^[iv] [507] v. Keating, Gallison, ii. 337. Kent's Comm. i. 68, 104-108. Pothier, De Propriété, Nos. 134-144. Anthon v. Fisher, note to Douglas's Rep. 526.^[v] Cornu v. Blackburn, ^[vi] Douglas, 641. *The Hoop*, Rob. i. 196. Ricord v. Bettenham, Burrow, iii. 1734. Halleck's Intern. Law, 670-674. Woolsey's Introd. § 142. Heffter, Europ. Völker. § 141. Phillimore's Intern. Law, iii. § 432. Bouvier's Law Dict. verb. 'Ransom'. Bello, Derecho Intern. Part II. ch. 5, § 9. Azuni, Droit Maritime, tom. 2, ch. 4, art. 7.^[vii] Emerigon, Des Prises, ch. 12, § 21. Valin, Des Prises, art. 19, 66.^[viii] De Cussy, Droit Maritime, liv. i. tit. 2, § 29. Miller v. Miller, Dallas, ii. 15. Vattel, Droit des Gens, liv. 3, ch. 17, § 278-286.]—D.

(b) *The Hoop*, Robinson's Adm. Rep. i. 201. See Lord Mansfield's judgment in the case of Ricord v. Bettenham, Burrow's Rep. 1734. Pothier, Propriété, Nos. 136, 137.

[²⁰⁰ See note 199, *supra*, on Ransoms. Halleck (pp. 665-673) treats fully of cartels, ransoms, ransom bills, the safeguards involved in them, the effect of recapture or loss, and remedies on the contracts of ransom. See also Wildman, ii. 26-31. Phillimore's Intern. Law, iii. 109-112, 432. Manning's Law of Nations, § 156-63.^[ix] Heffter, Europ. Völker. § 142. De Cussy, vol. i. tit. 3, § 29. Martens, § 275, 296. Bello, Derecho Intern. Part. II, ch. 95.^[x]]—D.

[¹ For 433 read 432.]—G.G.W.

[¹¹¹ For 526 read 649.]—G.G.W.

[^v For 526 read 649.]—G.G.W.

[^{vi} For Blackburn read Blackburne.]—G.G.W.

[^{vii} For art. 7 read art. 6.]—G.G.W.

[^{ix} For § 156-63 read pp. 156, 163.]—G.G.W.

[¹¹ For p. 2 read Pt. II.]—G.G.W.

[^{iv} For *Maissonniere* read *Maisonnaire*.]—G.G.W.

[^{viii} For 66 read p. 136.]—G.G.W.

[^x For ch. 95 read ch. 5, § 9.]—G.G.W.

[508] CHAPTER III

RIGHTS OF WAR AS TO NEUTRALS

Definition
of neutrality.

§ 412. IT deserves to be remarked, that there are no words in the Greek or Latin language which precisely answer to the English expressions, *neutral* and *neutrality*. The terms *neutralis*, *neutralitas*, which are used by some modern writers, are barbarisms, not to be met with in any classical author. The Roman civilians and historians make use of the words *amici*, *medii*, *pacati*, *socii*, which are very inadequate to express what we understand by *neutrals*, and they have no substantive whatever corresponding to *neutrality*. The cause of this deficiency is obvious. According to the laws of war, observed even by the most civilized nations of antiquity, the right of one nation to remain at peace, whilst other neighboring nations were engaged in war, was not admitted to exist. He who was not an ally was an enemy; and as no intermediate relation was known, so no word had been invented to express such relation. The modern public jurists, who wrote in the Latin language, were consequently driven to the necessity of inventing terms, to express those international relations which were unknown to the Pagan nations of antiquity, and which had grown out of a milder dispensation, struggling against the inveterate customs of the dark ages which preceded the revival of letters. Grotius terms neutrals *medii*, 'middle men.'^(a) Bynkershoek, in treating of the subject of neutrality, says:—'*Non hostes appello, qui neutrarum partium sunt, nec ex fœdere his illisve quicquam debent; si quid debeant, Fœderati sunt, non simpliciter Amici.*'^(b)

Different
species of
neutrality

[509] § 413. There are two species of neutrality recognized by international law. These are, 1st. Natural, or perfect neutrality; and 2d. Imperfect, qualified, or conventional neutrality.

Perfect
neutrality.

§ 414. Natural, or perfect neutrality, is that which every sovereign State has a right, independent of positive compact, to observe in respect to the wars in which other States may be engaged.

The right of every independent State to remain at peace, whilst other States are engaged in war, is an incontestable attribute of sovereignty. It is, however, obviously impossible, that neutral nations should be wholly unaffected by the existence of war between those

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 9.⁽¹⁾

(b) 'I call *neutrals* (*non hostes*) those who take part with neither of the belligerent powers, and who are not bound to either by any alliance. If they are so bound, they are no longer *neutrals*, but *allies*.' Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9, De Statu belli inter non hostes. We shall hereafter see that this definition is merely applicable to that species of neutrality which is not modified by special compact.

[¹ For cap. 9 read cap. 17.]—G.G.W.

communities with whom they continue to maintain their accustomed relations of friendship and commerce. The rights of neutrality are connected with correspondent duties. Among these duties is that of impartiality between the contending parties. The neutral is the common friend of both parties, and consequently is not at liberty to favor one party to the detriment of the other. (a) Bynkershoek states it to be 'the duty of neutrals to be every way careful not to interfere in the war, and to do equal and exact justice to both parties. *Bello se non interponant*,' that is to say, 'as to what relates to the war, let them not prefer one party to the other, and this is the only proper conduct for neutrals. A neutral has nothing to do with the justice or injustice of the war; it is not for him to sit as judge between his friends, who are at war with each other, and to grant or refuse more or less to the one or the other, as he thinks that their cause is more or less just or unjust. If I am a neutral, I ought not to be useful to the one, in order that I may hurt the other.' (b)

These, Bynkershoek adds, are 'the duties applicable to the condition of those powers who are not bound by any alliance, but are [510] in a state of *perfect* neutrality. These I merely call *friends*, in order to distinguish them from confederates and allies.' (c)

§ 415. Imperfect, qualified, or conventional neutrality, is that which is modified by special compact. Imperfect neutrality.

The public law of Europe affords several examples of this species of neutrality.

§ 416. Thus the political independence of the confederated Cantons of Switzerland, which had so long existed in fact, was first formally recognized by the Germanic Empire, of which they originally constituted an integral portion, at the peace of Westphalia, in 1648. The Swiss Cantons had observed a prudent neutrality during the thirty years' war, and from this period to the war of the French Revolution, their neutrality had been, with some slight exceptions, respected by the bordering States. But this neutrality was qualified by the special compact existing between the Confederation or the separate Cantons and foreign States, forming treaties of alliance or capitulations for the Neutrality of the Swiss Confederation.

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. iii. ch. 7, §§ 103-110.

(b) 'Horum officium est, omni modo carere, ne se bello interponant, et his quàm illis partibus sint vel æquiores vel iniquiores. . . . *Bello se non interponant*, hoc est, in causâ belli alterum alteri ne præferant, et eo solo recte defunguntur, qui neutrarum partium sunt. . . . Si recte judico, belli justitia vel injustitia nihil quicquam pertinet ad communem amicum; ejus non est, inter utrumque amicum, sibi invicem hostem, sedere judicem, et ex causâ æquiore vel iniquiore huic illive plus minusve tribuere vel negare. Si medius sim, alteri non possum prodesse, ut alteri noceam.' Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.

(c) 'Exposui compendio, quid mihi videatur de officio eorum, qui ex fœdere nihil quicquam debent, sed perfectè sunt neutrarum partium. Hos simpliciter *amicos* appellavi, ut à Fœderatis et Sociis distinguere.' Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.

enlistment of Swiss troops in the service of those States.²⁰¹ The policy of respecting the neutrality of Switzerland was mutually felt by the two great monarchies of France and Austria, during their long contest for supremacy under the houses of Bourbon and Hapsburg. Such is the peculiar geographical position of Switzerland, between Germany, France, and Italy, among the stupendous mountain chains from which flow the great rivers, the Danube, the Rhine, the Rhone, and the Po, that if the passage through the Swiss territories were open to the Austrian armies, they might communicate freely from the valley of the Danube to the valley of the Po, and thus menace the frontier of France from Basle to Nice. To guard against this impending danger, France must be fortified along the whole of this frontier; whilst, on the other hand, if the passes of the Swiss Alps are shut against her enemy, she may concentrate all her forces upon the Rhine; since all history shows that the attempts of the Imperialists to [511] penetrate into the southern provinces of France by the Var have ever failed, owing to the remoteness and difficulty of the scene of operations. The advantages to be derived by France from the permanent neutrality of Switzerland are therefore manifest. Nor is this neutrality less essential to the security of Austria. Let Switzerland once become a lawful battleground for the bordering States, and the French armies would be sure to anticipate its occupation by the Austrians. The two great Austrian armies operating, whether for offence or defence, the one in Swabia, the other in Italy, being separated by the massive rampart of the Alps, would have no means of communicating with each other; whilst the French forces, advancing from the Lake of Constance on the one side, and the great chain of the Alps on the other, might attack either the flank of the Austrian army in Swabia or the rear of its army in Italy. (a)

Neutrality
of Switzer-
land during
the wars of
the French
Revolution.

§ 417. During the wars of the French Revolution, the neutrality of Switzerland was alternately violated by both the great contending parties, and her once peaceful valleys became the bloody scene of hostilities between the French, Austrian, and Russian armies. The expulsion of the allied forces, and the subsequent withdrawal of the French army of occupation, were followed by violent internal dissensions which were finally composed by the mediation of Bonaparte as First Consul of the French Republic, in 1803. A treaty of alliance was simultaneously concluded between the Republic and the Helvetic Confederation. According to the stipulations of this treaty, the neutrality of Switzerland was recognized by France, whilst the Confederation

[²⁰¹ These capitulations for enlistments of such Swiss in foreign armies as were not subject to military service at home, have been withdrawn. *Annuaire des deux Mondes*, 1858, pp. 162, 299. See note 145, *ante*.]—D.

(a) Thiers, *Histoire du Consulat et de l'Empire*, tom. i. liv. iii. p. 182. (x)

For p. 182 read p. 235, ed. 1845.]—G.G.W.

stipulated not to grant a passage through its territories to the armies of France, and to oppose such passage by force of arms in case of its being attempted. The Confederation also engaged to permit the enlisting of eight thousand Swiss troops for the service of France, in addition to the sixteen thousand troops to be furnished according to the capitulation signed on the same day with the treaty. It was, at the same time, expressly declared that its alliance being merely defensive, should not, in any respect, be construed to prejudice the neutrality of Switzerland. (a)

[512] § 418. When the allied armies advanced to invade the French territory, in 1813, the Austrian corps under Prince Schwartzenberg passed through the territory of Switzerland, and crossed the Rhine at three different places: at Basle, Lauffenberg, and Schaffhausen, without opposition on the part of the federal troops. The perpetual neutrality of Switzerland was, nevertheless, recognized by a declaration of the Congress of Vienna, March 20th, 1815; (a) but on the return of Napoleon from the island of Elba, the allied powers invited the Confederation to accede to the general coalition against France. In the official note delivered by their ministers to the Diet at Zurich, on the 6th of May, 1815, it was stated, that although the allied powers expected that Switzerland would not hesitate to unite with them in accomplishing the common object of alliance, which was to prevent the re-establishment of the usurped revolutionary authority in France, yet they were far from proposing to Switzerland the development of a military force disproportioned to her resources and to the usages of her people. They respected the military system of a nation, which, uninfluenced by the spirit of ambition, armed for the single purpose of defending its independence and its tranquillity. The allied powers well knew the importance attached by Switzerland to the maintenance of the principle of her neutrality; and it was not with the purpose of violating this principle, but with the view of accelerating the epoch when it might become applicable in an advantageous and permanent manner, that they proposed to the Confederation to assume an attitude and to adopt energetic measures, proportioned to the extraordinary circumstances of the moment without at the same time forming a rule for the future. (b)

Proposal of the allies to Switzerland in 1815.

§ 419. In the answer of the Diet to this note, dated the 12th May, 1815, it was declared, that the relations which Switzerland maintained with the allied powers, and with them only, could leave no doubt as to her views and intentions. She would persist in them with that constancy and fidelity which had at all times distinguished the Swiss character. Twenty-two small republics, united together for their

The answer of the Swiss Diet.

(a) Schöll, *Histoire des Traités de Paix*, tom. ii. ch. 33, p. 339.

(a) Wheaton's *Hist. Law of Nations*, 493.

(b) Martens, *Nouveau Recueil*, tom. ii. p. 166.

security and the maintenance of their independence, must seek for their national [513] strength in the principle of their Confederation. This resulted inevitably from the nature of things, the geographical position, the constitution, and the character of the Swiss people. A consequence of this principle was the neutrality of Switzerland, recognized as the basis of its future relations with all other States. It followed from the same principle, that the most efficacious participation of Switzerland in the great struggle which was about to take place, must necessarily consist in the defence of her frontiers. In adopting this course, she did not separate herself from the common cause of the allied powers, which thus became her own national cause. The defence of a frontier fifty leagues in length, serving as a *point d'appui* for the movements of two armies, was in itself a co-operation not only real, but also of the highest importance. More than thirty thousand men had already been levied for this purpose. Determined to maintain this development of her forces, Switzerland had a right to expect from the favorable disposition of the allied powers, that, so long as she did not claim their assistance, their armies would respect the integrity of her territory. Assurances to this effect on their part were absolutely necessary in order to tranquillize the Swiss people, and engage them to support with fortitude the burden of an armament so considerable.^(a)

On the 20th of May, 1815, a convention was concluded at Zurich, to regulate the accession of Switzerland to the general alliance between Austria, Great Britain, Prussia, and Russia; by which the allied powers stipulated, that, in case of urgency, where the common interest rendered necessary a temporary passage across any part of the Swiss territory, recourse should be had to the authority of the Diet for that purpose. The left wing of the allied army accordingly passed the Rhine between Basle and Rheinfelden, and entered France through the territory of Switzerland.^(b)

Declaration
of November,
1815, as to
Swiss neu-
trality.

§ 420. On the re-establishment of the general peace, a declaration was signed at Paris, on the 20th November, 1815, by the four allied powers and France, by which these five powers formally recognized the perpetual neutrality of Switzerland, and guaranteed the integrity and inviolability of her territory within its new limits, as established by the [514] final act of the Congress of Vienna, and by the treaty of Paris of the above date. They also declared that the neutrality and inviolability of Switzerland, and her independence of all foreign influence, were conformable to the true interests of the policy of all Europe, and that no influence⁽¹⁾ unfavorable to the rights of Switzerland, in respect of her neutrality, ought to be drawn from the circumstances which had led to the passage of a part of the allied forces across the

(a) Martens, *Nouveau Recueil*, tom. ii. p. 170.

(b) *Ibid.*

[¹ For influence *read* inference.]—G.G.W.

Helvetic territory. This passage, freely granted by the Cantons in the convention of the 20th May, was the necessary result of the entire adherence of Switzerland to the principles manifested by the allied powers in the treaty of alliance of the 25th March.^(a)²⁰²

§ 421. The geographical position of Belgium, forming a natural barrier between France on the one side, and Germany and Holland on the other, would seem to render the [515] independence and neutrality of the first-mentioned country as essential to the preservation of peace between the latter powers, as is that of Switzerland to its maintenance between France and Austria. Belgium covers the most vulnerable point of the northern frontier of France against invasion from Prussia, whilst it protects the entrance of Germany against the armies of France, on a frontier less strongly fortified than that of the Rhine from Basle to Mayence. But so long as the low countries belonged to the house of Austria, either of the Spanish or the German branch, these provinces had been, for successive ages, the battle-ground on which the great contending powers of Europe struggled for the supremacy. The security of the independence of Holland against the encroachments of France was provided for by the barrier-treaties concluded at Utrecht, in 1713, and at Antwerp, in 1715, between Austria, Great Britain, and Holland, by which the fortified towns on the southern frontier of the Austrian Netherlands were to be permanently garrisoned with Dutch

Neutrality
of Belgium.

(a) Martens, *Nouveau Recueil*, tom. iv. p. 186.

[²⁰² *Neutrality of Switzerland and Savoy*.—The neutrality engaged for Switzerland has been much affected by the acquisition of Savoy by France, under the treaty of Turin of 1860, between France and Sardinia. The treaties of Vienna and Paris had insured the same neutrality to the parts of Savoy belonging to Sardinia as to Switzerland; and the Swiss Confederation was party to the arrangement, by acceding to the treaties, and by its own treaty of 1816 with Sardinia, and had a strong interest in the neutrality of Savoy, which it considered terminated, or at least materially impaired, by the cession to France. The Confederation claimed, that, if released by Sardinia, Savoy ought to be united to them. The French Empire ordered a popular vote in Savoy, which resulted in a great majority for annexation to France; but the Confederation denied that any effect should be given to that vote, under the circumstances in which it was taken, and appealed to the parties to the treaty of Vienna to interpose their authority. France and Sardinia contended that the neutrality guaranteed to Savoy was in favor of Sardinia only, yet agreed that France should undertake to fulfil the guaranty, as successor to Sardinia. This was not deemed satisfactory either by Switzerland or the other parties to the treaty of Vienna. England especially contended that the engagement of neutrality for Savoy was in the interest of all the treaty powers as well as of Switzerland and Sardinia. After the vote of Savoy was announced, France took possession, notwithstanding the protest and appeal of Switzerland, and the proposed conference of the powers, and made it understood that she would not relinquish her hold upon it; but, at the same time, proposed that the treaty powers should, by a conference, or by separate uniform agreements, secure the neutralization of Savoy under France. England and Russia favored the proposed conference, but it was never held; nor did the treaty powers finally recognize the cession or the obligation of France.

Almanach de Gotha, 1861. Circulars of the Swiss Confederation of 19th March and 5th and 9th April, 1860. Instructions of M. Thouvenel to the French ministers at the courts of the treaty powers, 7th April, 1860. Lord Russell to Lord Cowley, March 22, 1860. Circular of M. Thouvenel of June 20, 1860. *Annual Register*, 1860, p. 259. *Le Nord*, 15 February, 1861.]—D.

troops. The kingdom of the Netherlands was created by the Congress of Vienna, in 1815, for the purpose of forming a barrier for Germany against France; and on the dissolution of that kingdom into its original component parts, the perpetual neutrality of Belgium was guaranteed by the five great European powers, and made an essential condition of the recognition of her independence, in the treaties for the separation of Belgium from Holland.^(a)

Neutrality
of Cracow.

§ 422. We have already seen that by the final act of the Congress of Vienna, 1815, art. 6, the city of Cracow, with its territory, is declared to be a perpetually free, independent, and neutral State, under the joint protection of Austria, Prussia, and Russia.^(a) The neutrality, thus created by special compact and guaranteed by the three protecting powers, is made dependent upon the reciprocal obligation of the city of Cracow not to afford an asylum, or protection, to fugitives from justice, or military deserters belonging to the territories of those powers. How far the neutrality of the free and independent State thus created has been actually respected by the protecting powers, or how far the successive temporary occupations of its territory by their military forces, and how far their repeated forcible interference in its internal affairs, may have been justified by the non-[516]fulfilment of the above obligation on the part of Cracow, or by other circumstances authorizing such interference according to the general principles of international law, are questions which have given rise to diplomatic discussions between the great European powers, contracting parties to the treaties of Vienna, but which are foreign to the present object.^(b)

Conven-
tional or
guaranteed
neutrality
generally.

§ 423. The permanent neutrality of Switzerland, Belgium, and Cracow, has thus been solemnly recognized as part of the public law of Europe. But the conventional neutrality thus created differs essentially from that natural or perfect neutrality which every State has a right to observe, independent of special compact, in respect to the wars in which other States may be engaged. The consequences of the latter species of neutrality only arise in case of hostilities. It does not exist in time of peace, during which the State is at liberty to contract any eventual engagements it thinks fit as to political relations with other States. A permanently neutral State, on the other hand, by accepting this condition of its political existence, is bound to avoid in time of peace every engagement which might prevent its observing the duties of neutrality in time of war. As an independent State, it may lawfully exercise, in its intercourse with other States, all the attributes of external sovereignty. It may form treaties of amity, and even of

(a) Wheaton's Hist. Law of Nations, 552.

(a) *Vide supra*, §§ 28, 29⁽¹⁾ note c.

(b) Wheaton's Hist. Law of Nations, 441-445.

[¹ For §§ 28, 29 read § 34.]—G.G.W.

alliance with other States; provided it does not thereby incur obligations, which, though perfectly lawful in time of peace, would prevent its fulfilling the duties of neutrality in time of war. Under this distinction, treaties of offensive alliance, applicable to a specific case of war between any two or more powers, or guarantying their possessions, are of course interdicted to the permanently neutral State. But this interdiction does not extend to defensive alliances formed with other neutral States for the maintenance of the neutrality of the contracting parties against any power by which it might be threatened with violation.^(a)

The question remains, whether this restriction on the sovereign power of the permanently neutral State is confined to political alliances and guaranties, or whether it extends to treaties of commerce and navigation with other States. Here it again becomes necessary to distinguish between the two cases of natural and [517] perfect, or qualified and conventional neutrality. In the case of ordinary neutrality, the neutral State is at liberty to regulate its commercial relations with other States according to its own view of its national interests, provided this liberty be not exercised so as to affect that impartiality which the neutral is bound to observe towards the respective belligerent powers. Vattel states, that the impartiality which a neutral nation is bound to observe, relates solely to the war. 'In whatever does not relate to the war, a neutral and impartial nation will not refuse to one of the belligerent parties, on account of its present quarrel, what it grants to the other. This does not deprive the neutral of the liberty of making the advantage of the State the rule of its conduct in its negotiations, its friendly connections, and its commerce. When this reason induces it to give preferences in things which are at the free disposal of the possessor, the neutral nation only makes use of its right, and is not chargeable with partiality. But to refuse any of these things to one of the belligerent parties, merely because he is not at war with the other, and in order to favor the latter, would be departing from the line of strict neutrality.'⁽¹⁾(b)

These general principles must be modified in their application to a permanently neutral State. The liberty of regulating its commercial relations with other foreign States, according to its own views of its national interests, which is an essential attribute of national independence, does not authorize the permanently neutral State to contract obligations in time of peace inconsistent with its peculiar duties in time of war.

§ 424. Neutrality may also be modified by antecedent engage- Neutrality

(a) Arendt, *Essai sur la Neutralité de la Belgique*, pp. 87-95.

(b) Vattel, *Droit des Gens*, liv. iii. ch. 7, § 104.

[¹ Insert quotation mark *after* neutrality.]—G.G.W.

modified
by a limited
alliance with
one of the
belligerent
parties.

ments, by which the neutral is bound to one of the parties to the war. Thus the neutral may be bound by treaty, previous to the war, to furnish one of the belligerent parties with a limited succor in money, troops, ships, or munitions of war, or to open his ports to the armed vessels of his ally, with their prizes. The fulfilment of such an obligation does not necessarily forfeit his neutral character, nor render him the enemy of the other belligerent nation, because it does not render him the general associate of its enemy.(a)

[518] How far a neutrality, thus limited, may be tolerated by the opposite belligerent, must often depend more upon considerations of policy than of strict right. Thus, where Denmark, in consequence of a previous treaty of defensive alliance, furnished limited succors in ships and troops to the Empress Catharine II. of Russia, in the war of 1788 against Sweden, the abstract right of the Danish court to remain neutral, except so far as regarded the stipulated succors, was scarcely contested by Sweden and the allied mediating powers. But it is evident, from the history of these transactions, that if the war had continued, the neutrality of Denmark would not have been tolerated by these powers, unless she had withheld from her ally the succors stipulated by the treaty of 1773, or Russia had consented to dispense with its fulfilment.(b)²⁰³

Qualified
neutrality,
arising out
of antece-
dent treaty
stipulations,
admitting
the armed
vessels and
prizes of one
belligerent
into the
neutral
ports, whilst
those of the
other are
excluded.

§ 425. Another case of qualified neutrality arises out of treaty stipulations antecedent to the commencement of hostilities, by which the neutral may be bound to admit the vessels of war of one of the belligerent parties, with their prizes, into his ports, whilst those of the other may be entirely excluded, or only admitted under limitations and restrictions. Thus, by the treaty of amity and commerce of 1778, between the United States and France, the latter secured to herself two special privileges in the American ports:—1. Admission for her privateers, with their prizes, to the exclusion of her enemies. 2. Admission for her public ships of war, in case of urgent necessity, to refresh, victual, repair, &c., but not exclusively of other nations at war with her. Under these stipulations, the United States not being expressly bound to exclude the public ships of the enemies of France, granted an asylum to British vessels and those of other powers at war with her. Great Britain and Holland still complained of the exclusive privileges

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. iii. ch. 6, §§ 101–105. As to the general principles to be applied to such treaties, and when the *casus fœderis* arises, vide *suprà*, §§ 279, 280.

(b) Annual Register, xxx, 181, 182. State Papers, 292. Eggers, Leben von Bernstorff, 2 Abtheil, 118–195.

[²⁰³ The progress of modern times has been towards insisting on entire and impartial neutrality. It is difficult to conceive now of a State being permitted to continue a condition of limited and partial neutrality. A belligerent would be justified in treating any State as an enemy throughout, which rendered any aid to its enemy, whether in pursuance of treaty obligations or not, or which gave or withheld belligerents' privileges unequally.]—D.

allowed to France in respect to her privateers and prizes, whilst France herself was not satisfied with the interpretation of the treaty by which the public ships [519] of her enemies were admitted into the American ports. To the former, it was answered by the American government, that they enjoyed a perfect equality, qualified only by the exclusive admission of the privateers and prizes of France, which was the effect of a treaty made long before, for valuable considerations, not with a view to circumstances such as had occurred in the war of the French Revolution, nor against any nation in particular, but against all nations in general, and which might, therefore, be observed without giving just offence to any. (a)

On the other hand, the Minister of France asserted the right of arming and equipping vessels for war, and of enlisting men, within the neutral territory of the United States. Examining this question under the law of nations and the general usage of mankind, the American government produced proofs, from the most enlightened and approved writers on the subject, that a neutral nation must, in respect to the war, observe an exact impartiality towards the belligerent parties; that favors to the one, to the prejudice of the other, would import a fraudulent neutrality, of which no nation would be the dupe; that no succor ought to be given to either, unless stipulated by treaty, in men, arms, or any thing else, directly serving for war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power can levy men within the territory without its consent; that, finally, the treaty of 1778, making it unlawful for the enemies of France to arm in the United States, could not be construed affirmatively into a permission to the French to arm in those ports, the treaty being express as to the prohibition, but silent as to the permission. (b)²⁰⁴

[520] § 426. The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory

Hostilities
within the
territory of
the neutral
State.

(a) Mr. Jefferson's Letter to Mr. Hammond and Mr. Van Berckel, Sept. 9, 1793: Waite's⁽¹⁾ State Papers, i. 169, 172.

(b) Mr. Jefferson's Letter to Mr. G. Morris, Aug. 16, 1793: Waite's⁽¹⁾ State Pap. i. 140.

[²⁰⁴ On this point in the diplomatic history of the United States, and on the principle of such qualified and limited advantages given by a neutral to one belligerent by force of a treaty made when the belligerent nations were at peace, see Kent's Comm. i. 116. Phillimore's Intern. Law, iii. § 138-144. Heffter, §§ 144-6. Halleck, 514-516. Manning, 167. Ortolan, *Diplomatie de la Mer*, tom. ii. ch. 4. Hautefeuille, tit. 4, ch. 1. Trescot's *Dipl. Hist.* 138, 208-215. C. F. Adams's *Life of John Adams*, x. 254.⁽¹¹⁾ Gibb's *Administrations of Washington and Adams*, i. 490. Pitkin's *History of the United States*, vol. i. ch. 10. Woolsey's *Introd.* § 155.

The troublesome provisions in the treaty between France and the United States of 6th February, 1778, were annulled by the convention of 30th September, 1800, which gave no special privileges during war. See note 215, *infra*, on Neutrality Laws or Foreign Enlistment Acts.]—D.

[¹ For Waite's read Wait's.]—G.G.W.

[¹¹ The reference x. 254 seems to be incorrect.]—G.G.W.

belonging to no one. Hence it follows, that hostilities cannot lawfully be exercised within the territorial jurisdiction of the neutral State, which is the common friend of both parties.^(a)

Passage
through
the neutral
territory.

§ 427. This exemption extends to the passage of an army or fleet through the limits of the territorial jurisdiction, which can hardly be considered an innocent passage, such as one nation has a right to demand from another; and, even if it were such an innocent passage, is one of those *imperfect* rights, the exercise of which depends upon the consent of the proprietor, and which cannot be compelled against his will. It may be granted or withheld, at the discretion of the neutral State: but its being granted is no ground of complaint on the part of the other belligerent power, provided the same privilege is granted to him, unless there be sufficient reasons for withholding it.^{'(1)'(a)}²⁰⁵

The extent of the maritime territorial jurisdiction of every State bordering on the sea has already been described.^(b)²⁰⁶

Captures
within the
maritime
territorial
jurisdiction,
or by vessels
stationed
within it, or
hovering on
the coasts.

§ 428. Not only are all captures made by the belligerent cruisers within the limits of this jurisdiction absolutely illegal and void, but captures made by armed vessels stationed in a bay or river, or in the mouth of a river, or in the harbor of a neutral State, for the purpose of exercising the rights of war from this station, [521] are also invalid. Thus, where a British privateer stationed itself within the River Mississippi, in the neutral territory of the United States, for the purpose of exercising the rights of war from the river, by standing off and on, obtaining information at the Balize, and overhauling vessels in their course down the river, and made the capture in question within three English miles of the alluvial islands formed at its mouth, restitution of the captured vessel was decreed by Sir W. Scott. So, also, where a belligerent ship, lying within neutral territory, made a capture with her boats out of the neutral territory, the capture was held to be invalid: for though the hostile force employed was applied to the captured vessel lying out of the territory, yet no such use of a

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8. Martens, des Prises et Reprises, ch. 2, § 18.

(a) *Vide ante*, § 193. Vattel, Droit des Gens, liv. iii. ch. 7, §§ 119-131. Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, § 13. Sir W. Scott, Robinson's Adm. Rep. iii. 353.

[²⁰⁵ Modern writers, except some of the German school, express strongly the opinion, that for a neutral to permit an army of a belligerent to pass over its territory for a purpose of war, would be so far an abandonment of neutrality. A special license in a particular case to one belligerent would not be justified by an offer to grant a special license in a like case to the other; for the exigency, the means of using the license, and the advantages to be gained by it, are too varying to insure equality: and it can hardly be supposed that a neutral will grant a general license of passage to both parties, at their option. Phillimore's Intern. Law, iii. §§ 152-154. Halleck, 518, 524. Kent's Comm. i. 119. Manning, 182-6. Wildman, i. 64. Heffter, § 147. Hautefeuille, tit. 5. ch. 1. Summaries of the treaties for passage of troops are given in Manning's Law of Nations, 182-6, and Phillimore's Intern. Law, iii. § 152-4.]—D.

(b) *Vide ante*, §§ 177-180.

[²⁰⁶ See note 105, *ante*, on Territorial Waters.]—D.

[Delete quotation mark after withholding it.]—G.G.W.

neutral territory for the purposes of war is to be permitted. This prohibition is not to be extended to *remote* uses, such as procuring provisions and refreshments, which the law of nations universally tolerates: but no *proximate* acts of war are in any manner to be allowed to originate on neutral ground.^(a)²⁰⁷

(a) The Anna, November, 1805, Robinson's Adm. Rep. v. 373; The Twee Gebroeders, July, 1800, iii. 162.

[²⁰⁷ *Case of The Chesapeake*, in 1863.—The Chesapeake, a licensed American merchant-steamer, sailed from New York bound for Portland, Dec. 5, 1863, with a cargo on freight. The second day out, sixteen men, who came on board as passengers,—under command of one Braine,—rose, killed one officer, wounded two others, put the master in irons, and took possession of the steamer. They landed the master and most of the crew at St. John, N.B., and ran the steamer to several small ports in Nova Scotia successively, reported her as the Confederate war-steamer Retribution, and landed cargo and obtained coal and supplies. News of her real character having reached some of these ports, she was forbidden to land any thing more. She was then run to Samboro,⁽¹⁾ N.S., where Braine and his party left her. On news of this piracy reaching the United States Government, Mr. Seward communicated the facts to Lord Lyons, and made a request that the authorities in Nova Scotia would arrest and detain the pirates until a formal demand for their extradition, under the treaty of 1842, could be made, and would take possession of the vessel for the purpose of delivering her to her owners; and, at the same time, United States cruisers were sent out, in various directions, to search for the Chesapeake. One of these, a temporary war-vessel (the Ella and Annie), being off Samboro,⁽¹⁾ saw a steamer in the harbor, with a signal of distress flying,—steamed in, and found her to be the Chesapeake, deserted by her piratical crew, and in possession of some of her original crew, who delivered her to the Ella and Annie. There were also on board two men (British subjects) who had joined her as engineers, in the employ of the pirates. These two men were made prisoners. There was also, lying near to the Chesapeake, a small schooner, which had attempted to coal her, on board which was found concealed one of the pirates, named Wade, with a quantity of baggage and other articles from the Chesapeake. Wade was taken from her, and placed in irons. The United States steamer Dacotah came into port, and Captain Clary, as senior officer, assumed charge of affairs. He immediately took the Chesapeake to Halifax, and made known to the British [522] authorities the circumstances of the seizure: and, as it was made in British waters, he offered to deliver the Chesapeake and the three prisoners to the authorities; at the same time requesting that the men should be secured, so that they could be held for extradition under the treaty of 1842, and that the vessel should be redelivered to her owners. Captain Clary, at the same time, expressed a hope that the authorities would consent to leaving the vessel in charge of the captors, to be by them taken home for the purpose of redelivery. Mr. Seward addressed Lord Lyons, giving an outline of the facts, and disclaiming, on the part of the government, any claim to exercise authority within the waters of Nova Scotia; and offering, if any such had been attempted, to express the regret of the government, and its readiness to make satisfactory amends; and offered to deliver the vessel and pirates into the hands of the British authorities at Halifax, if that should be required; but, in that event, making demand for the extradition of the men for trial as pirates, and for a delivery of the vessel to her owners. At the same time, he proposed another mode of proceeding; viz., that the vessel and men be allowed to remain in the hands of the naval captors, to be brought to the United States, with the understanding that they would be still delivered to the British authorities if required,—the United States, in that event, making the same demands for extradition of the men and delivery of the vessel to her owners. After correspondence between Lord Lyons and the authorities of Nova Scotia, and between the latter and the American Consul and Captain Clary, the proposition of Mr. Seward was not accepted; and the British authorities took the ground that the capturing of the vessel and the seizing and imprisoning of the men on British waters, and especially the taking of Wade from a British vessel in British waters, constituted such a violation of British sovereignty as required them to demand a formal delivery of the vessel to their authority, and a setting-free of the men on British soil, as well as an apology and disclaimer by the government of the United States. Thereupon the Chesa-

[¹ For Samboro read Sambro.]—G.G.W.

Vessels
chased into
the neutral
territory,
and there
captured.

[522] § 429. Although the immunity of the neutral territory from the exercise of any act of hostility is generally admitted, yet an excep-

peake was delivered to the British authorities at Halifax for adjudication in the courts; and an arrangement was made to deliver the three prisoners to the sheriff of the county. The American Consul had the proper papers prepared, and made a formal demand for the extradition of the prisoners for trial in the United States; and warrants for their arrest, under the terms of the treaty, were signed by the proper authorities, under the treaty and statutes, and placed by them in the hands of police officers, with orders to arrest the men on the wharf as soon as they should be released from the custody of the United States naval officers. The prisoners were taken ashore from the *Dacotah*, released from their irons, and delivered to the custody of the sheriff, who declared them at large. They escaped from the wharf in boats, before arrest on the warrants, by the aid of several prominent citizens, and were never arrested. The United States Government considered the escape permissive on the part of the British executive officers; but this was denied by them, and the British political authorities. The question as to the arrest and escape of the pirates was not pursued further between the two governments.

In a letter of Jan. 9, 1864, from Mr. Seward to Lord Lyons, he states that the President considered the arrest of the vessel and pirates by the United States naval authorities to have been done 'under the influence of a patriotic and commendable zeal to bring to⁽¹⁾ punishment outlaws who had offended against the peace and [523] dignity of both countries,' and without any unnecessary severity or violence. That, at the same time, he regarded these acts as unjustifiable in strictness of law, and regrets and disapproves them 'as a violation of the law of nations, and of the friendly relations existing between the two countries,' and had directed the naval officer to be censured for this violation. Earl Russell, in a letter to Lord Lyons, of Feb. 3, 1864, states that the British Government is satisfied with the letter of Mr. Seward.

The Advocate-General, in behalf of the crown, instituted proceedings in the Vice-Admiralty Court at Halifax against the *Chesapeake* as having been piratically taken at sea. The owners of the vessel and cargo made claims to them in court; but no appearance was entered, either for Braine and his party, or for the United States naval captors. The affidavits exhibited showed only a piratical seizure, and the Advocate-General consented to a delivery of the vessel and cargo to the several claimants—without stipulations to cover latent claims—as a restoration from piratical seizure. The judge (the Hon. Alexander Stewart) ordered delivery; giving at the time an elaborate opinion to the effect, that, on the affidavits alone, no belligerent authority for the seizure by Braine and his party appearing, the seizure was piratical, and the restoration proper; and intimated that, even if, as had been suggested by an *amicus curiæ* at the bar, Braine and his party acted under belligerent authority, their course was such as to deprive them of the benefit of that plea in the court of the neutral; for they had brought their prize, uncondemned, into the ports of that neutral, and concealed her there to escape recapture by vessels searching for her, and landed and sold cargo, both enemy's and neutral property alike, and obtained supplies surreptitiously and under false names; and then, instead of appearing to claim their prize in court, had abandoned her, and fled the province in avoidance of warrants issued by the authorities of the province. This restitution of vessel and cargo ended the question between the two governments.

The whole case is resolved into a few elements: Whether Braine and his party were pirates *jure gentium*, or only criminals by the municipal law of the United States, the naval officers of the United States, as belligerents, had no right to arrest them or the vessel within British territorial jurisdiction. Disclaimer and apology by the United States became necessary, and were freely tendered. The United States regarded the case as one of pure piracy, and the act of its officers in making the arrest as the result of a zealous desire to perform a duty to mankind, and accompanied with no wilful or unnecessary force or rudeness; and, as the port was a small one, with no local police force, the retaking possession of persons and property piratically seized, under such circumstances, for the sole purpose of delivering them at once into competent neutral custody, constituted rather a formal than a serious violation of the law of nations, for which restoration of the vessel and prisoners to British authority, disclaimer, apology, and a censure of the officers, was an adequate satisfaction and security. Great Britain acquiesced in this view. No competent claim of belligerent authority for the seizure by Braine and his

[¹ For to punishment read to deserved punishment.]—G.G.W.

tion to it has been attempted to be raised in the case of a hostile vessel met on the high seas [523] and pursued; which it is said may, in the pursuit, be chased within the limits of a neutral territory. The only text-writer of authority who has maintained this anomalous principle is Bynkershoek.^(a) He admits that he had never seen it mentioned in the writings of [524] the public jurists, or among any of the European nations, the Dutch only excepted; thus leaving the inference open, that even if reasonable in itself, such a practice never rested upon authority, nor was sanctioned by general usage. The extreme caution, too, with which he guards this license to belligerents, can hardly be reconciled with the practical exercise of it; for how is an enemy to be pursued in a hostile manner within the jurisdiction of a friendly power, without imminent danger of injuring the subjects and property of the latter? *Dum fervet opus*—in the heat and animation excited against the flying foe, there is too much reason to presume that little regard will be paid to the consequences that may ensue to the neutral. There is, then, no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. 'When the fact is established,' says Sir W. Scott, 'it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy.'^(b)²⁰⁸

party was ever made, either in the courts or to the [524] political authorities of Great Britain. So the legal and political character of the case was one of piracy, with a notion that a color of belligerent authority might possibly have existed, which was never produced. The restitution of the vessel and cargo to the owners, by rule of the Vice-Admiralty Court, on motion of the crown officer, ended the question as to the vessel; and the escape of the men, between their discharge and re-arrest, closed the question as to extradition. U. S. Dip. Corr. 1864, Part I. pp. 46, 72, 77, 121, 196, 431; Part II. pp. 401-407, 468, 474, 482, 483, 488, 490, 511, 538, 562, 650. Papers presented to the House of Commons in reply to the Address of March 7, 1864, North America, No. 9.]—D.

(a) Quæst. Jur. Pub. lib. i. cap. 8. This opinion of Bynkershoek, in which Casaregis seems to concur, is reprobated by several other public jurists. Azuni, *Diritto Maritimo*, Part I.⁽¹⁾ ch. 4, art. 1. Valin, *Traité des Prises*, ch. 4, § 3, No. 4, art. 1. D'Habreu, *Sobre las Prisas*,⁽¹¹⁾ Part I. ch. 4, § 15.

(b) The Vrow Anna Catharina, Robinson's Adm. Rep. v. 15.

[²⁰⁸ *Belligerent Acts in Neutral Waters*.—It may be considered the settled practice of nations, intending to be neutral, to prohibit belligerent cruisers from entering their ports, except from stress of weather or other necessity, or for the purpose of obtaining provisions and making repairs requisite for seaworthiness. They must not increase their armament or crew, or add to their belligerent efficiency. It is now the custom to fix a short time for the stay of such vessels, after they have done what is permitted them, or the marine exigency has passed, —usually twenty-four hours. These rules, however, are at the option of the neutral. But, at all events, no acts of hostility are permitted within neutral waters, nor can neutral ports or waters be made a base of operations. Cruising within those limits, to prevent entrance or exit by an enemy, is prohibited, and all forms of using the asylum of neutral waters for hostile acts. The fact that a chase is pursued, *dum fervet opus*, into neutral territory, does not justify a capture there. (Halleck's Intern. Law, 520. Kent's Comm. i. 120. Phillimore's Intern. Law,

[¹ For Part I read Part II.]—G.G.W.

[¹¹ For D'Habreu, *Sobre las Prisas* read de Abreu, *Sobre pressas de mar*.]—G.G.W.

Claim on
the ground
of violation
of neutral
territory
must be
sanctioned
by the neu-
tral State.

[525] § 430. Though it is the duty of the captor's country to make restitution of the property thus captured within the territorial

iii. § 154. Heffter, *Europ. Völker*. § 146. Manning's *Law of Nations*, 186, 386.) It is usual, and indeed necessary, in order to prevent an undue use of neutral waters as asylum, to establish a rule as to the departure of hostile belligerents lying in a neutral port at the same time. Twenty-four hours' delay is now often exacted of one belligerent after the other shall have sailed, which, in case of steamers, is sufficient. And, if a cruiser is within the neutral waters, though not in port, the neutral may [525] convoy the belligerent in port beyond its waters, and insist that the other shall keep within the waters for a reasonable time thereafter.

During the Russian war, in 1854, Sweden and Denmark made declarations as to their course of neutrality in similar terms. They would admit belligerent vessels into their ports (reserving the right to prohibit the use of certain fortified ports); allow them to get supplies of stores not contraband of war; and would exclude the entrance and sale of all prizes, except in cases of proved distress. (Phillimore's *Intern. Law*, iii. § 141.)

During the civil war in the United States, the British Government issued general regulations as to all its ports in the kingdom or beyond seas, and special regulations as to the ports in the British West Indies near to the United States. The Order in Council of 31st January, 1862, provides that cruisers of either belligerent, entering any British port, shall leave it after twenty-four hours, 'except in case of stress of weather, or of her requiring provisions, or things necessary for the subsistence of her crew, or repairs;' and, in that case, she must sail as soon as possible after the reason for remaining ceases, and, in no event, more than twenty-four hours thereafter. It prohibits the taking on board of supplies 'beyond what may be necessary for her immediate use.' It prohibits, in general terms, belligerent cruisers 'making use of any port, roadstead, &c., as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities of warlike equipment.' As to supplies of coal, they are limited to such as may be necessary to carry the cruiser to the nearest port of her own country, or some nearer port; and no vessel shall without special permission, obtain a second supply of coal within three months of a previous supply obtained within British waters. Earl Russell made a distinction as to coal, that the furnishing it by a merchant to a war-steamer of either belligerent in Europe, so far from her own ports, might be considered the furnishing of a matter of general necessity; but refused to allow a steamer of the United States to take coal at Nassau from vessels sent there by the Navy Department, with coal consigned to the United States Consul, for the supply of their war-steamers. (Earl Russell to Mr. Adams, March 25, 1862.) The Order in Council provides, that, if vessels of both belligerents are within British waters, the proper official may order the time of sailing of each; and no armed vessel of one belligerent shall be permitted to depart from the limits of British waters until at least twenty-four hours after the vessel of the other belligerent, whether it be an armed vessel or a merchantman, shall have sailed and passed beyond those waters. As to the Bahama Islands, the Order makes the further prohibition that no cruisers of either belligerent shall come within their waters, except by special leave of the Lieutenant-Governor, or in case of stress of weather.

(In Phillimore's *Intern. Law*, iii. § 380, may be found a reference to the chief treaties on the subject of receiving prizes and permitting their sale in neutral ports, from 1654 to 1829.)

The government of the United States made no objection to this order as a regulation between belligerents, although it objected to the recognition of belligerency of the rebels.

See the correspondence between Mr. Adams, Earl Russell, and Mr. Seward, between [526] 1861 and 1865, in the volumes of *Diplomatic Correspondence* of those years; especially the letters of Earl Russell to Mr. Adams, of Jan. 10, 1862, and Feb. 1, 1862, relating to the *Tuscarora* and *Nashville*. See also Earl Russell's speech of March 10, 1862, and his reply to the Liverpool ship-owners of July 5, 1862.

Violations of neutral waters by acts of war were almost the rule, rather than the exception, in the early wars and those arising out of the French Revolution. British cruisers seldom hesitated to continue their pursuit of any vessels into neutral territory, and even to complete their capture in neutral ports; and the cutting enemy's vessels out of neutral ports by boat expeditions was a common occurrence. In those days, it was rarely that a nation powerful enough to resent such an injury was not either an enemy or an ally of England. A memorable instance was that of the capture and destruction of four French vessels off Lagos, in Portugal, by a British fleet, which had pursued them there. Portugal made earnest remonstrances, and

jurisdiction of the neutral State, yet it is a technical rule of the prize courts to restore to the individual claimant, in such a case, only on the

demanding restitution or indemnification, by which she could satisfy the claims of France upon her. Although the British Government treated Portugal with great courtesy, Mr. Pitt instructed his minister to avoid the direct issue, and to suggest the fact of hot pursuit; but privately assuring him that restitution or compensation would not be made: and it was not. France alleged the failure of Portugal to insist on her rights against England as one of the justifications for her invasion. In 1793, the French frigate *Ambuscade* captured a British merchant-vessel (*The George*) in Delaware Bay, and took her to Charleston as a prize; and the United States Government, on complaint of the British Government, brought the subject to the attention of the French Minister, who caused the vessel to be restored. (Mr. Jefferson to M. Ternaut, May 15, 1793; opinion of the Attorney-General, May 14, 1793; and reply of M. Genet, of May 27, 1793. Waite's¹ *Am. State Papers*, i. 69-80.) In 1805, the British Court of Admiralty restored an American vessel captured within American waters, near the Mississippi River, by a British privateer, and taken to England as a prize, on suspicion of unneutral character. *The Anna*, Rob. v. 373.

During the war of 1812-15 between the United States and Great Britain, the United States frigate *Essex* was attacked and compelled to surrender, while at anchor, dismasted, in Valparaiso, by the British frigate *Phœbe* and sloop-of-war *Cherub*. The sloop-of-war *Levant*, a recent prize to the United States frigate *Constitution*, was chased into Port Praya, and captured while at anchor there by vessels from the British fleet. The United States privateer General Armstrong, lying in the harbor of Fayal, was destroyed by vessels from the British fleet. The demand upon Portugal, by the United States, for indemnification, was ultimately left to the arbitration of Louis Napoleon, then President of the French Republic. He recognized the attack as a violation of neutral rights, but decided against indemnification, on the ground that the privateer did not demand protection from the Portuguese authorities at the time, but resisted by battle the unjust attack of the British vessels, instead of relying upon the neutral protection. This decision was not satisfactory to the United States, as they did not consider the fact on which it rested as established in proof. The principle of the decision must certainly be confined to cases where the vessel attacked has reason to believe that effectual protection can be seasonably afforded by the neutral, and makes a fair choice to take the chances of a combat rather than to appeal to neutral protection. Ex. Doc. 32d Cong. Senate,¹¹ No. 24.

In the case of the schooner *Caroline*, that vessel had been employed by Canadian insurgents to carry munitions of war and persons taking part in the insurrection, from [527] the New York side of the Niagara River to the Canadian side. A Canadian armed force was sent to capture her, expecting to find her on the Canada side; but, learning that she was on the American side, they went over and destroyed her. In the correspondence between Mr. Webster and Lord Ashburton on the subject, Mr. Webster contended, that, for such an infringement of territorial rights, the British Government must show 'a necessity of self-defence, instant, overwhelming, and leaving no choice of means and no moment for deliberation;' and it should further appear that the Canadian authorities, in acting under this exigence, 'did nothing unreasonable or excessive.' Lord Ashburton admitted the correctness of Mr. Webster's doctrine, contended that the circumstances came up to that statement of it, and 'regretted that some explanation and apology for the occurrence was not immediately made.' This was accepted by the United States as satisfactory. (Webster's Dip. and Off. Papers, 112-120. Webster's Works, vi. 255-262, 292-303.)

On the general doctrine of the rights and obligations of neutrals in giving asylum to belligerent cruisers within their waters, and belligerent acts done therein, see also Halleck's *Intern. Law*, 517-523, Kent's *Comm.* i. 118-125, Heffter, *Europ. Völker*, § 146-150, Hautefeuille, *Droits des Nat. Neutr.* tit. 6, ch. 1, § 1, De Cussy, *liv. i. tit. 3, § 13*, Ortolan, *Règl. Intern.* liv. ii. ch. 8, Manning's *Law of Nations*, 387, Martens, *Précis du Droit des Gens*, § 310.

On the occasion of a complaint by the British Government that a cruiser of the United States had captured a vessel in British waters, Mr. Seward, by direction of the President, addressed a note to the Secretary of the Navy, of Aug. 8, 1862, giving strict instructions to be communicated to the officers of the navy, 'under no circumstances to seize any foreign vessel

[¹ For Waite's *read* Wait's.]—G.G.W.

[¹¹ For Cong. Senate *read* Cong. 2d sess. Senate.]—G.G.W.

application of the neutral government whose territory has been thus [526] violated. This rule is founded upon the principle, that the neutral State alone has been injured by the capture, and that the hostile [527] claimant has no right to appear for the purpose of suggesting the invalidity of the capture.^(a)²⁰⁹

[528] § 431. Where a capture of enemy's property is made within neutral territory, or by armaments unlawfully fitted out within the same, it is the right as well as the duty of the neutral State, where the property thus taken comes into its possession, to restore it to the original owners. This restitution is generally made through the agency

Restitution
by the neu-
tral State of
property
captured
within its
jurisdiction,
or otherwise
in violation
of its neu-
trality.

within waters of a friendly nation,' and wrote to Lord Lyons, that, if any act of hostility or pursuit was committed within the maritime jurisdiction of Great Britain, the act would be disavowed, and ample redress [528] would be promptly given. (Mr. Seward to Lord Lyons, June 16, 1863: *Dip. Corr.* 1863, p. 581.)

In October, 1864, the armed steamer *Florida*, which, under rebel colors and command, had been depredating on American commerce, sought refuge in Bahia, and was permitted to remain forty-eight hours, for necessary repairs and supplies. The United States steamer *Wachusett*, which was lying in Bahia, took out the *Florida* by night, from under the guns of a Brazilian corvette which had her in charge, and sent her as prize to the United States. The Brazilian Government at once remonstrated against this violation of its territory, demanding explanation and reparation. No mode of reparation was alluded to. Mr. Seward replied, condemning the act as a violation of territorial rights of Brazil admitting of no justification. In reparation, he stated that the commander of the *Wachusett* would be subjected to trial by court martial; and that the President would dismiss the United States Consul at Bahia, who had lent active aid in the capture. As to the crew of the *Florida*, he said, that, although they were liable as pirates under our law, and those who were citizens as traitors, yet, as their arrest was in violation of the sovereign rights of Brazil, they would be permitted to leave the jurisdiction of the United States. The *Florida* herself had been sunk by a collision in Hampton Roads, the circumstances of which had been inquired into, and were held to be an accident for which the United States was not responsible. With this reply, the Brazilian Government expressed itself satisfied. In this correspondence, Mr. Seward took care to protest against the admission of vessels of war, under the rebel colors, to rights of belligerents by Brazil; and to deny that the *Florida*, even if the rebels were to be treated as lawful belligerents, was a proper cruiser in that service, under the circumstances of her English building and outfitting. Correspondence of Mr. Seward and Señ. Da Silva, Dec. 12 and 26, 1864.]—D.

(a) Robinson's *Adm. Rep.* iii. ⁽¹⁾note, Case of *The Etrusco*. The *Anne*, Wheaton's *Rep.* iii. 447.

[²⁰⁹ Although this phrase has been repeated by many text-writers, it can hardly be said to be simply a 'technical rule of prize courts.' It involves a direct and paramount question of right, and is settled upon principle. If a neutral vessel, which has violated neutrality so as to make herself liable to condemnation as prize, is captured as such at sea by a cruiser, and sent in for adjudication, the court will condemn her as prize, on the merits of the case. It is not a valid defence that the place of her arrest was the waters of some other neutral power. The breach of sovereign territorial right is a matter solely between the State making the capture and the State whose territory is entered upon. The demand made by the latter State may involve the restitution of the prize, and so, if complied with, operate in favor of the vessel in the hands of the court, whether neutral or enemy; but that is only an indirect effect. If the offended State does not demand restitution, or if the belligerent government refuses it, the prize will be condemned. It is not to be supposed that even the demand of the neutral State would operate directly a restitution of the prize, by the court, against the will or without the consent of the sovereignty under which the court sits. In short, the question is one of international diplomacy, and not a rule of decision in prize law between the captor and the claimant. (Judge Story, in *The Anne*, Wheaton's *Rep.* iii. 435. Judge Sprague, in *The Lilla*, Sprague's *Decisions*, ii.; and *Law Reporter*, xxv. 92.)—D.]

[¹ Insert 162.]—G.G.W.

of the courts of admiralty and maritime jurisdiction. Traces of the exercise of such a jurisdiction are found at a very early period in the writings of Sir Leoline Jenkins, who was Judge of the English High Court of Admiralty in the reigns of Charles II. and James II. In a letter to the king in council, dated October 11, 1675, relating to a French privateer seized at Harwich with her prize, (a Hamburg vessel bound to London,) Sir Leoline states several questions arising in the case, among which was, 'Whether this Hamburger, being taken within one of your Majesty's chambers, and being bound for one of your ports, ought not to be set free by your Majesty's authority, notwithstanding he were, if taken upon the high seas out of those chambers, a lawful prize. I do humbly conceive he ought to be set free, upon a full and clear proof that he was within one of the king's chambers at [529] the time of the seizure, which he, in his first memorial, sets forth to have been eight leagues at sea, over against Harwich. King James (of blessed memory) his direction,⁽¹⁾ by proclamation, March 2, 1604, being that all officers and subjects, by sea and land, shall rescue and succor all merchants and others, as⁽¹¹⁾ shall fall within the danger of such as shall await the coasts, in so near places to the hindrance of trade outward and homeward; and all foreign ships, when they are within the king's chambers, being understood to be within the places intended in those directions, must be in safety and indemnity, or else when they are surprised must be restored to it, otherwise they have not the protection worthy of your Majesty, and of the ancient reputation of those places. But this being a point not lately settled by any determination, (that I know of, in case where the king's chambers precisely, and under that name, came⁽¹¹¹⁾ in question,) is of that importance as to deserve your Majesty's declaration and assertion of that right of the crown by an act of State in council, your Majesty's coasts being now so much infested with foreign men of war, that there will be frequent use of such a decision.' (a)

Whatever doubts there may be as to the extent of the territorial jurisdiction thus asserted, as entitled to the neutral immunity, there can be none as to the sense entertained by this eminent civilian respecting the right and the duty of the neutral sovereign to make restitution where his territory is violated.

§ 432. When the maritime war commenced in Europe, in 1793, the American government, which had determined to remain neutral, found it necessary to define the extent of the line of territorial protection claimed by the United States on their coasts, for the purpose of giving effect to their neutral rights and duties. It was stated on this

Extent of the neutral jurisdiction along the coasts and within the bays and rivers.

(a) Life and Works of Sir L. Jenkins, ii. 727.^(1v)

[¹ For direction read directions.]—G.G.W.
[¹¹¹ For came read come.]—G.G.W.

[¹¹ For as read that.]—G.G.W.
[^{1v} For 727 read 780.]—G.G.W.

occasion, that governments and writers on public law had been much divided in opinion as to the distance from the sea-coast within which a neutral nation might reasonably claim a right to prohibit the exercise of hostilities. The character of the coast of the United States, remarkable in considerable parts of it for admitting no vessel of size to pass near the shore, it was thought would entitle them in reason to as broad a margin of protected navigation as any nation whatever. The government, however, did not propose, at that [530] time, and without amicable communications with the foreign powers interested in that navigation, to fix on the distance to which they might ultimately insist on the right of protection. President Washington gave instructions to the executive officers to consider it as restrained, for the present, to the distance of one sea league, or three geographical miles, from the sea-shores. This distance, it was supposed, could admit of no opposition, being recognized by treaties between the United States, and some of the powers with whom they were connected in commercial intercourse, and not being more extensive than was claimed by any of them on their own coasts. As to the bays and rivers, they had always been considered as portions of the territory, both under the laws of the former colonial government and of the present union, and their immunity from belligerent operations was sanctioned by the general law and usage of nations. The 25th article of the treaty of 1794, between Great Britain and the United States, stipulated that 'neither of the said parties shall permit the ships or goods belonging to the citizens or subjects⁽¹⁾ of the other, to be taken within cannon-shot of the coast, nor in any of the bays, ports, or rivers, of their territories, by ships of war, or others, having commissions from any prince, republic, or state whatever.²¹⁰ But in case it should so happen, the party whose territorial rights shall thus have been violated, shall use his utmost endeavors to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels.' Previously to this treaty with Great Britain, the United States were bound by treaties with three of the belligerent nations, (France, Prussia, and Holland,) to protect and defend, 'by all the means in their power,' the vessels and effects of those nations in their ports or waters, or on the seas near their shores, and to recover and restore the same to the right owner when taken from them. But they were not bound to make compensation if *all the means in their*

[²¹⁰ This article of the treaty expired, by its own limitation, in twelve years, and has not been repeated in later treaties. As to the extent of territorial waters, see note 105, *ante*, on Territorial Waters; note 113, *ante*, on National Appropriation of Open Seas; and note 142, *ante*, on The North-eastern Fisheries. As to Delaware Bay, see the opinion of the Attorney-General, May 14, 1793, Waite's⁽¹¹⁾ Am. State Papers, i. 72.]—D.

[¹ For citizens or subjects *read* subjects or citizens.]—G.G.W.

[¹¹ For Waite's *read* Wait's.]—G.G.W.

power were used, and failed in their effect. Though they had, when the war commenced, no similar treaty with Great Britain, it was the President's opinion that they should apply to [531] that nation the same rule which, under this article, was to govern the others above mentioned; and even extend it to captures made on the high seas, and brought into the American ports, if made by vessels which had been armed within them. In the constitutional arrangement of the different authorities of the American Federal Union, doubts were at first entertained whether it belonged to the executive government, or the judiciary department, to perform the duty of inquiring into captures made within the neutral territory, or by armed vessels originally equipped or the force of which had been augmented within the same, and of making restitution to the injured party. But it has been long since settled that this duty appropriately belongs to the federal tribunals, acting as courts of admiralty and maritime jurisdiction.^(a)

§ 433. It has been judicially determined that this peculiar jurisdiction to inquire into the validity of captures made in violation of the neutral immunity, will be exercised only for the purpose of restoring the specific property, when voluntarily brought within the territory, and does not extend to the infliction of vindictive damages, as in ordinary cases of maritime injuries. And it seems to be doubtful whether this jurisdiction will be exercised where the property has been once carried *infra præsidia* of the captor's country, and there regularly condemned in a competent court of prize. However this may be in cases where the property has come into the hands of a *bonâ fide* purchaser, without notice of the unlawfulness of the capture, it has been determined that the neutral court of admiralty will restore it to the original owner, where it is found in the hands of the captor himself, claiming under the sentence of condemnation. But the illegal equipment will not affect the validity of a capture, made after the cruise to which the outfit has been applied, is actually terminated ^(a)²¹¹

Limitations of the neutral jurisdiction to restore in cases of illegal capture.

§ 434. An opinion is expressed by some text-writers, that belligerent cruisers, not only are entitled to seek an [532] asylum and hospitality in neutral ports, but have a right to bring in and sell their prizes within those ports. But there seems to be nothing in the established principles of public law which can prevent the neutral State from

Right of asylum in neutral ports dependent on the consent of the neutral State.

(a) Mr. Jefferson's Letter to M. Genet, Nov. 8, 1793: Waite's⁽¹⁾ State Papers, vi.⁽¹¹⁾ 195. Opinion of the Attorney-General on the capture of the British ship *Grange*, May 14, 1793, Ibid. i. 75. Mr. Jefferson's Letter to Mr. Hammond, Sept. 5, 1793: Waite's⁽¹⁾ State Papers, i. 165. Wheaton's Reports, iv. 65, note *a*.

(a) The *Amistad de Rues*, Wheaton's Rep. v. 385. *La Nereyda*, Ibid. viii. 108. *The Fanny*, Ibid. ix. 658. *The Arrogante Barcelones*, Ibid. vii. 519. *The Santissima Trinidad*, Ibid. 283.

[²¹¹ See note 215, *infra*, on Neutrality or Foreign Enlistment Acts.]—D.

[1 For Waite's read Wait's.]—G.G.W.

[11 For vi. read i.]—G.G.W.

withholding the exercise of this privilege impartially from all the belligerent powers; or even from granting it to one of them, and refusing it to others, where stipulated by treaties existing previous to the war.²¹² The usage of nations, as testified in their marine ordinances, sufficiently shows that this is a rightful exercise of the sovereign authority which every State possesses, to regulate the police of its own seaports, and to preserve the public peace within its own territory. But the absence of a positive prohibition implies a permission to enter the neutral ports for these purposes.^(a)²¹³

Neutral impartiality, in what it consists.

§ 435. Vattel states that the impartiality, which a neutral nation ought to observe between the belligerent parties, consists of two points.

1. To give no assistance where there is no previous stipulation to give it; nor voluntarily to furnish troops, arms, ammunition, or any thing of direct use in war. 'I do not say to *give assistance equally*, but to *give no assistance*: for it would be absurd that a State should assist at the same time two enemies. And besides, it would be impossible to do it with equality: the same things, the like number of troops, the like quantity of arms, of munitions, &c., furnished under different circumstances, are no longer equivalent succors. 2. In whatever [533] does not relate to the war, the neutral must not refuse to one of the parties, merely because he is at war with the other, what she grants to that other.⁽¹⁾^(a)

Arming and equipping vessels, and enlisting men within the neutral territory, by either belligerent, unlawful.

§ 436. These principles were appealed to by the American government, when its neutrality was attempted to be violated on the commencement of the European war, in 1793, by arming and equipping vessels, and enlisting men within the ports of the United States, by the respective belligerent powers, to cruise against each other. It was stated that if the neutral power might not, consistently with its

[²¹² A nation cannot expect to maintain its neutrality long, if its treaties put it in that situation in a great maritime war, to the disadvantage of any leading maritime power. See note 145, *ante*.]—D.

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 15. Vattel, liv. iii. ch. 7, § 132. Valin, Comm. sur l'Ordonn. de la Marine, tom. ii. p. 272.

[²¹³ Halleck's Intern. Law, 523; Heffter, Europ. Völker. §§ 146-150; Hautefeuille, Droits des Nat. Neutr. tit. 6, ch. 2; Manning's Law of Nations, 387; and the opinion of Attorney-General Cushing, April 28, 1855 (Opinion of Attorneys-General, vii. 123), in the case of the British ship-of-war Sitka. This opinion presents all the learning on the subject; and the conclusion was reached, upon which the President acted, that, in the absence of any prohibition, a belligerent ship-of-war of a friendly nation might visit our ports with her prizes, and remain there a reasonable time for the ordinary purposes of temporary repairs and supplies, and her commander would not be subject to obey a writ of *habeas corpus*, issued by a local tribunal to inquire into the lawfulness of the custody of her prisoners of war on board.

The aversion to recognizing privateering in war has led to rules less favorable to privateers than to regular cruisers. (Hautefeuille, tom. i. p. 380.) In the late American war, though the United States employed no privateers, the neutral maritime powers prohibited such vessels their ports, except as a refuge from stress of weather.]—D.

(a) Droit des Gens, liv. iii. ch. 7, § 104.

[¹ Insert quotation mark *after* other.]—G.G.W.

neutrality, furnish men to either party for their aid in war, as little could either enrol them in the neutral territory. The authority both of Wolfius and Vattel was appealed to in order to show, that the levying of troops is an exclusive prerogative of sovereignty, which no foreign power can lawfully exercise within the territory of another State, without its express permission. The testimony of these and other writers on the law and usage of nations was sufficient to show, that the United States, in prohibiting all the belligerent powers from equipping, arming, and manning vessels of war in their ports, had exercised a right and a duty with justice and moderation. By their treaties with several of the belligerent powers, treaties forming part of the law of the land, they had established a state of peace with them. But without appealing to treaties, they were at peace with them all by the law of nature; for, by the natural law, man is at peace with man, till some aggression is committed, which by the same law authorizes one to destroy another, as his enemy. For the citizens of the United States, then, to commit murders and depredations on the members of other nations, or to combine to do it, appeared to the American government as much against the laws of the land as to murder or rob, or combine to murder or rob, their own citizens; and as much to require punishment, if done within their limits, where they had a territorial jurisdiction, or, on the high seas, where they had a personal jurisdiction, that is to say, one which reached their own citizens only; this being an appropriate part of each nation, on an element where each has a common jurisdiction.^(a)²¹⁴

[534] § 437. The same principles were afterwards incorporated in a law of Congress, passed in 1794, and revised and re-enacted in 1818, by which it is declared to be a misdemeanor for any person, within the jurisdiction of the United States, to augment the force of any armed vessel, belonging to one foreign power at war with another power, with whom they are at peace; or to prepare any military expedition against the territories of any foreign nation with whom they are at peace; or to hire or enlist troops or seamen for foreign military or naval service; or to be concerned in fitting out any vessel, to cruise or commit hostilities in foreign service, against a nation at peace with them; and the vessel, in this latter case, is made subject to forfeiture. The President is also authorized to employ force to compel any foreign vessel to depart, which by the law of nations or treaties ought not to remain within the United States, and to employ generally the public force in enforcing the duties of neutrality prescribed by the law.^(a)

The United States neutrality acts.

(a) Mr. Jefferson's Letter to M. Genet, June 17, 1793: Am. State Papers, i. 155.

[²¹⁴ See note 215, *infra*, on Neutrality or Foreign Enlistment Acts.]—D.

(a) Kent's Comm. i. 123.

The British
Foreign En-
listment Act.

§ 438. The example of America was soon followed by Great Britain, in the act of Parliament 59 Geo. III. ch. 69, entitled, 'An act to prevent the Enlisting or Engagement of His Majesty's Subjects to serve in foreign Service, and the Fitting out or Equipping in His Majesty's Dominions Vessels for warlike purposes, without His Majesty's License.' The previous statutes, 9 and 29 Geo. II., enacted for the purpose of preventing the formation of Jacobite armies in France and Spain, annexed capital punishment as for a felony, to the offence of entering the service of a foreign State. The 59 Geo. III. ch. 69, commonly called the Foreign Enlistment Act, provided a less severe punishment, and also supplied a defect in the former law, by introducing after the words, 'king, prince, state, or potentate,' the words 'colony or district assuming the powers of a government,'⁽¹⁾ in order to reach the case of those who entered the service of unacknowledged as well as of acknowledged States. The act also provided for preventing and punishing the offence of fitting out armed vessels, or supplying them with warlike stores, upon which the former law had been entirely silent.

Debates in
Parliament
on the act
of 1819.

§ 439. In the debates which took place in Parliament upon the enactment of the last-mentioned act in 1819, and on the motion for its repeal in 1823, it was not denied by Sir J. Mackintosh and other members who opposed the [535] bill, that the sovereign power of every State might interfere to prevent its subjects from engaging in the wars of other States, by which its own peace might be endangered, or its political and commercial interests affected. It was, however, insisted that the principles of neutrality only required the British legislature to maintain the laws in being, but could not command it to change any law, and least of all to alter the existing laws for the evident advantage of one of the belligerent parties. Those who assisted insurgent States, however meritorious the cause in which they were engaged, were in a much worse situation than those who assisted recognized governments, as they could not lawfully be reclaimed as prisoners of war, and might, as engaged in what was called rebellion, be treated as rebels. The proposed new law would go to alter the relative risks, and operate as a law of favor to one of the belligerent parties. To this argument it was replied by Mr. Canning, that when peace was concluded between Great Britain and Spain in 1814, an article was introduced into the treaty by which the former power stipulated not to furnish any succors to what were then denominated the revolted colonies of Spain. In process of time, as those colonies became more powerful, a question arose of a difficult nature, to be decided on a due consideration of their

[1 The text to which reference is made reads: 'foreign prince, state, potentate, colony, province or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of government'.]—G.G.W.

de jure relation to Spain on the one hand, and their *de facto* independence on the other. The law of nations afforded no precise rule as to the course which, under circumstances so peculiar as the transition of colonies from their allegiance to the parent State, ought to be pursued by foreign powers. It was difficult to know how far the statute law or the common law was applicable to colonies so situated. It became necessary, therefore, in the act of 1819, to treat the colonies as actually independent of Spain; and to prohibit mutually, and with respect to both, the aid which had been hitherto prohibited with respect to one only. It was in order to give full and impartial effect to the provisions of the treaty with Spain, which prohibited the exportation of arms and ammunition to the colonies, but did not prohibit their exportation to Spain, that the act of Parliament declared that the prohibition should be mutual. When, however, from the tide of events flowing from the proceedings of the Congress of Verona, war became probable between France and Spain, it became necessary to review these relations. It was obvious that if war actually broke out, the British government must either extend to France [536] the prohibition which already existed with respect to Spain, or remove from Spain the prohibition to which she was then subject, provided they meant to place the two countries on an equal footing. So far as the exportation of arms and ammunition was concerned, it was in the power of the crown to remove any inequality between the belligerent parties, simply by an order in council. Such an order was consequently issued, and the prohibition of exporting arms and ammunition to Spain was removed. By this measure the British government offered a guaranty of their *bonâ fide* neutrality. The mere appearance of neutrality might have been preserved by the extension of the prohibition to France, instead of the removal of the prohibition from Spain; but it would have been a prohibition of words only, and not at all in fact; for the immediate vicinity of the Belgic ports to France would have rendered the prohibition of direct exportation to France totally nugatory. The repeal of the act of 1819 would have, not the same, but a correspondent effect to that which would have been produced by an order in council prohibiting the exportation of arms and ammunition to France. It would be a repeal in words only as respects France, but in fact respecting Spain; and would occasion an inequality of operation in favor of Spain, inconsistent with an impartial neutrality. The example of the American government was referred to, as vindicating the justice and policy of preventing the subjects of a neutral country from enlisting in the service of any belligerent power, and of prohibiting the equipment in its ports of armaments in aid of such power. Such was the conduct of that government under the presidency of Washington, and the secretaryship of Jefferson; and such was more recently the conduct of the

American legislature in revising their neutrality statutes in 1818, when the Congress extended the provisions of the act of 1794 to the case of such unacknowledged States as the South American colonies of Spain, which had not been provided for in the original law.^(a)²¹⁵

(a) Annual Register, lxi. 71. Canning's Speeches, iv. 150; v. 34.

[²¹⁵ *Neutrality or Foreign Enlistment Acts.*—The laws for the better preservation of neutrality have come into so much notice since the author's death, that it is necessary to give them a much fuller consideration than they received in the text. It is proposed to consider, *first*, the political history of the subject before the passage of the statutes in question; *second*, the judicial construction they have received; and, *third*, the political history of the subject since their enactment.

I. POLITICAL HISTORY OF THE SUBJECT IN THE UNITED STATES BEFORE THE STATUTES.

[537] Statutes for the better preservation of neutrality, which have come to be known in England as 'Foreign Enlistment Acts,' had their origin in the United States. They arose out of the endeavor of Washington's administration to maintain, under great difficulties, neutrality in the wars of the French Revolution. In order to secure the aid of France in their struggle for independence, the United States had made terms in their Treaty of Commerce, of 1778, which caused them great trouble afterwards. By the 17th article of that treaty, French public ships or privateers could take their prizes into American ports, without restriction of cause or time, and the legality of the captures could not be there inquired into; while the United States were bound to close their ports against prizes made from the French by nations at war with France, except as ports of refuge in stress of weather, and, in such case, to require their departure at the earliest practicable moment. By the 22nd article, privateers of a nation at war with France were to be prohibited, in ports of the United States, from fitting themselves, and from selling their prizes, or procuring stores beyond what should be necessary to take them to the nearest port of their own country.

In 1793, the French frigate *Ambuscade* captured an English merchant vessel, the *George*, in Delaware Bay, and brought her to Philadelphia. The United States restored her, as her capture was a clear violation of sovereign territorial right. M. Genet, ambassador from the French Republic, had undertaken to fit out privateers in the ports of the United States to cruise against British commerce, and to enlist American citizens to serve on board them. The British claim for the restoration of their prizes, on the sole ground that the privateers which captured them were fitted out in our ports, presented great difficulties, under our treaty. President Washington issued, on the 22d April, 1793, his celebrated Proclamation of Neutrality. After reciting the existence of war between France on the one part, and Great Britain and other powers on the other, and declaring that it was the duty and interest of the United States to pursue in good faith a course of conduct 'friendly and impartial towards the belligerent powers,' and exhorting all citizens to avoid acts tending to contravene that policy, it declared, that no citizen would be protected against punishment or any forfeiture which he might incur, under the law of nations, by 'committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations.' The chief feature, however, of the proclamation was the announcement that the President had instructed the proper officers to institute prosecutions 'against all persons who shall, within the cognizance of the courts of the United States, violate the law of nations with respect to the powers at war, or any of them.' At this time the United States had no statutes on the subject of neutrality.

As the object of M. Genet was not only to use the United States as a base of maritime warfare, but to involve the country in war with England, this proclamation was an object of attack by him and the French party in America. Gratitude to France for her assistance in obtaining our independence, sympathy with democratic institutions for which France was at war, and the remains of hostile feeling against [538] England, combined to make the support and execution of this proclamation matter of great difficulty. Am. State Papers, i. 44.

The privateers fitted out in the United States, under the auspices of the French Minister and French consuls, took many prizes, and brought them into ports of the United States. In these ports, the French consuls undertook to hold prize courts, authorized thereto by the French Republic, and to condemn and sell the prizes. The British Minister, Mr. Hammond,

[537] § 440. The unlawfulness of belligerent captures, made within the territorial jurisdiction of a neutral State, is incontestably established

Immunity of the neutral territory, how far it extends to neutral vessels on the high seas.

remonstrated. M. Genet claimed the right under the law of nations and the Treaty of Commerce. The claim was denied by the United States Government, in a letter by the Secretary of State, Mr. Jefferson; and the ground was taken, that, of national right, all judicial functions within the territory of the United States must be exercised only by the government of the United States, and that such right had not been impaired by any treaty with France. (Am. State Papers, i. 144.) This, with the decision of the Supreme Court in *The Betsey* (Dallas, iii. 6, *infra*), put an end to French consular courts of prize in the United States.

It appeared that the French privateers were not only fitted out and manned, but commissioned, within the United States; and that American citizens were enlisted to serve on board them. M. Genet contended that the laws of the United States did not forbid its citizens joining a foreign service, and that such an act was, *pro tanto*, a renunciation of allegiance; that no law prohibited French citizens from doing acts of belligerent business in the United States, including the giving and receiving of commissions, not being acts of violence or overt war. (Am. State Papers, i. 79, 83.) This was denied by the government of the United States. But, at the same time, it became necessary to draw a line between commercial dealings with belligerents in materials of war, and the fitting out of vessels, enlisting of men, and commissioning of officers here for hostile operations. The British Minister had objected to the export of arms to France by our citizens, or from our ports by French citizens. In reply to this, Mr. Jefferson wrote his celebrated letter of 25th⁽¹⁾ May, 1793. (Jefferson's Works, iii. 588. Am. State Papers, i. 69.) In that he declared that 'the commissioning, equipping, and manning vessels in our ports, to cruise against⁽¹¹⁾ any of the belligerent parties, is entirely disapproved, and the government will take effectual means⁽¹¹⁾ to prevent a repetition of it;' but that the right of our citizens 'to make, vend, and export arms,' which were mechanical and commercial callings, was one which a foreign war could not take away. If our citizens exported arms on their own account, they did it subject to capture and condemnation by belligerents.

In respect to the fitting-out of privateers, the government was soon called upon to act by the bringing into Philadelphia of a prize to the French privateer Citizen Genet, which had been fitted out at Charleston. Mr. Jefferson wrote to M. Genet, that the 'arming and equipping of vessels in the ports of the United States, to cruise against nations with whom they were at peace, was incompatible with the territorial sovereignty of the United States; made them instrumental to the annoyance of those nations, and thereby tended to compromise their peace; and that he thought it necessary, as an evidence of good faith to them, as well as a public reparation to the [539] sovereignty of the country, that the armed vessels of this description should depart from the ports of the United States.'

Genet claimed the right of remaining in our ports, under the 17th and 26th articles of the Treaty of Commerce. But the government held that the privilege did not extend to vessels fitted out in our ports to cruise against friendly commerce.

The British Minister claimed that the prizes captured by such cruisers, and coming within American jurisdiction, should be restored. This claim was embarrassing to Washington, under the treaty with France. The result was, a despatch of 5th June, 1793, to the British and French ministers, which became an epoch in American neutrality. It declared that the fitting-out and commissioning of cruisers would be prohibited hereafter, and demanded the departure of such vessels from our ports; but, as to the surrender of prizes already taken by French privateers so fitted out, the government declined to enforce it, on the ground that these acts were done in remote ports, at the beginning of the war, before the proclamation, when parties did not know their rights under the treaty, and the laws of nations were not ascertained, and the difficulty of communication was great; and that, if the United States did its duty in suppressing such acts in the future, it ought to be accepted as a reasonable measure of justice between the belligerent powers, under the peculiar situation of the country. It was suggested also, that, if the captures were invalid, the Courts of Admiralty in the United States would deliver up the prizes, on private application and suit.

M. Genet refused to abandon the fitting-out of privateers, and especially, in one case, sent

[¹ For 25th read 15th.]—G.G.W.

[¹¹ For means read measures.]—G.G.W.

[¹¹ For against read on.]—G.G.W.

on principle, usage, and authority. Does this immunity of the neutral territory from the exercise of acts of hostility within its limits, extend

a privateer, *Le Petit Democrat* (previously, the merchantman *Little Sarah*), to sea, in violation of his pledged word to Mr. Jefferson.

The despatch of 5th June was now followed up by a circular letter of 4th August, 1793, to the collectors of customs throughout the United States. This circular laid down rules for the guidance of the revenue officers as to vessels equipped in ports of the United States: 1. The 'original arming and equipping' of vessels by belligerents, for military service, is unlawful. 2. 'Equipments of merchant-vessels, purely as such,' is lawful. 3. 'Equipments of vessels of war in the immediate service of the government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature as being applicable to either commerce or war, are deemed lawful.' 4. Equipments, by any of the parties at war with France, of vessels fitted for merchandize or war, whether with or without commissions, which are doubtful in their nature as being applicable either to commerce or war, are deemed lawful. 5. Applies the same rule to French vessels. 6. Equipments of every kind, of privateers of the powers at war with France, are deemed unlawful. 7. Equipments of vessels which are of a nature solely adapted to war, are deemed unlawful. 8. Vessels of either of the parties not armed, or armed previously to their coming into ports of the United States, which shall not have infringed any of the foregoing rules, may lawfully engage or enlist their own subjects or citizens not being inhabitants of the United States.

To most of the rules was added an exception, intended to fulfil the 17th article of the French treaty, which is of no general importance now.

Under these rules, the revenue officers were instructed to refuse asylum to armed vessels of a belligerent, originally fitted out in the United States, or to the prizes of any such vessel. But the 'purchasing and exporting, by way of merchandise, any articles commonly called contraband, being generally warlike instruments and military stores, are free to all parties.' *Am. State Papers*, i. 122.

'At the same time with the issuing of these rules, Mr. Jefferson, on the 7th August [540] (*Am. State Papers*, i. 136), wrote to M. Genet, that the President had determined to make the notice of 5th June, 1793, the date of a new rule as to France; that the President would consider the United States bound to restore all prizes which had been captured by privateers fitted out in the United States, and brought into port after that day, or to make compensation therefor; and that the President therefore expected the French Minister to deliver up to the government all prizes taken by such vessels and brought into port after that date.

A new rule was also applied to Great Britain, founded on the despatch of 5th June, and the letter to M. Genet of 7th August, which was declared by a letter from Mr. Jefferson to Mr. Hammond, of 5th September, 1793. (*Am. State Papers*, i. 165.) This rule was, that restitution was refused of prizes brought into the United States before the notice of 5th June; but was to be made of prizes brought into port after that and before the 7th August, with compensation in default of restitution. This was on the ground that the United States, to preserve amicable relations with France under its treaty, had purposely forbore to use all the means in its power for the restitution of such vessels. As to prizes so taken and brought in after the 7th August, the President felt bound to use all the means in his power for their restitution; but, if these failed, he did not admit, as a rule, an obligation to make compensation, but left the cases for special consideration as they should occur.

After the 7th August, 1793, it is believed that no privateers were fitted out; and those which had been fitted out in ports of the United States before that time, and had returned, were not permitted to go to sea with armaments on board. In December, 1793, M. Genet was superseded, at Washington's request, by a new minister, who was instructed to disarm the privateers fitted out in the United States, to remove the consuls who had acted in violation of the proclamation, circular, and despatches of Washington, and to disavow the acts of M. Genet.

The trials of *Guinet* and *Henfield*, and the proceedings in the case of *Les Jumeaux* (afterwards *Le Cassius*), and other acts of the government, are involved in the judicial proceedings, and are considered under the subsequent head of the Judicial History of this subject.

At the opening of the next session of Congress (December, 1793), Washington communicated his proclamation, despatches, and circulars, with the facts that preceded and

to the vessels of the nation on the high seas, and without the jurisdiction of any other State?

attended them, and suggested legislation for the better preservation of neutrality. Congress approved the policy of the President, and passed the celebrated statute of 5th June, 1794 (U. S. Laws, i. 381), generally called, at the time, the Neutrality Act.

The course pursued by Washington and his Cabinet, in sustaining neutrality and impartiality, has received the commendations of the masters of public law in all nations. Aided by the genius of two such men as Hamilton and Jefferson, he may be supposed to have been well supported; but his task was a hard one. The French had a constant appeal to the gratitude and sympathy of the Americans; popular feeling ran high; the jurisdiction of the courts in criminal cases was doubtful; and the power of the government—itself a recently inaugurated experiment—to resist popular opinion, had never been tested. He had no navy, nor even a naval department, and substantially no army. He was obliged to rely upon the militia of the States to make the seizure of vessels and persons, where resistance was feared. The French privateer *Republican* was seized at New York by Governor Clinton, with the State forces, in June, 1793, and was retained in custody for more than a year, against the remonstrances [541] of M. Genet, and with the acknowledgments of Mr. Hammond. See *Am. State Papers*, i. 152-4. *Hamilton's Works*, iv. 424.

Mr. Randolph, now Secretary of State, writes to Mr. Jay, Aug. 11, 1794, in proof of our honest efforts to preserve neutrality, that the militia of Richmond, in Virginia, 'actually marched, at a moment's warning, between seventy and eighty miles, to seize a vessel supposed to be under preparation as a French privateer.' *Writings of Washington* (Sparks's), ii. 42.⁽¹⁾

In 1816, during the civil wars between the South American provinces and the parent States in Europe, the Portuguese Minister complained that privateers were fitted out in American ports, and sailed thence under colors of the revolted Portuguese colonies, often officered and manned by Americans, and returned to American ports and were refitted. He acquitted the government of any want of disposition to punish the offenders, and suggested that the difficulty lay in the want of preventive remedies in the act of 1794. He said, 'I am persuaded that my magnanimous sovereign will receive a more dignified satisfaction and worthier of his high character, by the enactment of such laws by the United States as, insuring the respect due to his flag in future, would show their regard for His Majesty, than in the punishment of a few obscure offenders.' (M. J. Correa de Serra to Mr. Monroe, 20th December, 1816.) President Madison, within a week of the receipt of this letter, on the 26th December, sent a message to Congress, calling its attention to an enlargement of the preventive powers under the statute, and recommending that power be given to require security against improper employment of vessels, and to seize and detain them in suspicious cases. Mr. Forsyth, chairman of the Committee on Foreign Relations, in a letter to the Secretary of State, sketched the changes proposed by the committee, which were considered satisfactory by the administration; and, on the 3d March, 1817, an act was passed, limited to two years, which was made permanent by the act of 20th April, 1818. The latter act repealed the act of 1794, and renewed its provisions, but with the additional preventive powers. The amended acts of 1817 and 1818 were entirely satisfactory to the Portuguese Minister, who considered the preventive powers of far more value than those which merely punished a completed offence. The new clauses required the owners or consignees of any armed vessel to give bond, with sufficient sureties in double the value of the vessel, cargo, and armament, that it should not be employed by them to cruise or commit hostilities against any State or people with whom the United States were at peace; and authorized the revenue officers to detain any vessel about to depart under circumstances rendering it probable that she would be so employed. (§§ 10, 11, act 20th April, 1818.) At the same time, from a suggestion of the Spanish Minister that the South American provinces in revolt, and not recognized as independent, might not be included in the word 'state,' the words 'colony, district, or people,' were added.

Persons in the service of the insurgent colonies seized upon two places near the American coast, but beyond our jurisdiction, and not within the certain limits of any responsible power (Amelia Island and Galveston), and made them bases of naval operations against Spain and Portugal. President Madison having called the attention of Congress to this state of things,

[¹ This reference seems to be incorrect.]—G.G.W.

[538] We have already seen, that both the public and private vessels of every independent nation on the high seas, and without the

Congress recommended the suppression of these establishments, and the President took the extreme step of breaking them up by military force, apparently on the ground that they were a kind of international nuisance, which it was in our power to suppress without a serious violation of [542] territoriality of any responsible sovereign. The committee of Congress reasons that: 'If not checked by all the means in the power of the government, the existence of these establishments would have authorized claims from the subjects of any foreign governments for indemnities, at the expense of this nation, for captures by our people in vessels fitted out in our ports, and, as could not fail of being alleged, countenanced by the very neglect of the necessary means of suppressing them.'

II. THE UNITED STATES STATUTES FOR THE BETTER PRESERVATION OF NEUTRALITY.

The original and chief act is that of 5th June, 1794. It was continued in force for a limited time by the act of 2d March, 1797, and perpetuated by the act of 24th April, 1800. On the 14th June, 1797, an act was passed to prevent citizens from privateering against nations in amity with the United States. The amended act, giving preventive powers, was passed 3d March, 1817. The whole subject was codified in the act of 20th April, 1818, and the former acts repealed.

The provisions of the act of 1818 are as follows:—

Sect. 1 prohibits any citizen within the United States from accepting and exercising a commission to serve, in war, any foreign State, &c., against any State, &c., with which the United States are at peace.

(The phrase used throughout the act is 'any foreign prince, state, colony, district, or people'.)

Sect. 2 makes it criminal for any person within the United States to enlist on board any armed vessel of a foreign State, &c., whether public vessel or privateer; or to procure any other person so to enlist; or to go beyond the jurisdiction of the United States for the purpose of so enlisting,—with an exception, permitting such enlistment on board a vessel of a subject of the State owning the vessel, where it was completely fitted and commissioned as a vessel of war before its arrival in the United States, and the person enlisting was only transiently within the United States.

Sect. 3 makes it criminal for any person within the United States to fit out or arm a vessel, or attempt or procure, or be concerned in, &c., with intent that it shall be employed in the service of any foreign State to commit hostilities against any State at peace with the United States, or issue or deliver a commission to such a vessel with like intent. This section also forfeits the vessel, her stores and armament, and all materials procured for building and equipping her.

Sect. 4 relates to privateering by citizens against commerce of the United States.

Sect. 5 makes it criminal for any person in the United States to increase or augment the force of any vessel of war or privateer of a foreign State, or to attempt or procure, or be concerned therein, which State is at war with a State in amity with the United States, by adding or increasing the force of 'any equipment solely applicable to war.'

Sect. 6 makes it criminal for any person within the United States to begin or set on foot, or provide means for, any military expedition or enterprise to be carried on from thence against any foreign State with which the United States is at peace.

Sect. 7 gives the district courts jurisdiction of complaints for captures made within a marine league of the shores of the United States.

Sect. 8 authorizes the President to employ the land or naval forces or militia to prevent such enterprises or expeditions, and to take possession of or detain any vessel or her prizes, in order to execute the provisions of the act, or to make restitution if so adjudged.

Sect. 9 authorizes the employment of the same force to compel the departure [543] of any vessel which, by treaty or the law of nations, ought not to remain within the United States.

Sect. 10 requires the owners or consignees of armed vessels about to sail from the United States, owned in whole or in part by citizens of the United States, to give security that the same shall not be employed by them in hostilities against any State with which the United States is at peace.

Sect. 11 authorizes revenue officers to detain any vessel, manifestly built for warlike

territorial limits of any other State, are subject to the municipal jurisdiction of the State to which they belong.²¹⁶ This jurisdiction is

purposes, whose cargo shall consist chiefly of munitions of war, when the circumstances render it probable that she is intended to be used in hostilities against any State with which the United States is at peace.

III. JUDICIAL HISTORY OF THE SUBJECT IN THE UNITED STATES.

United States v. Gideon Henfield (Wheaton's⁽¹⁾ State Trials, 49). The defendant was an American sailor, who shipped in the French privateer *Citoyen Genet* at Charleston, while France was at war with England, and was indicted at common law for enlisting in violation of the treaties of the United States. The judges ruled that the act charged was a crime. In defence, it was shown that he enlisted before the proclamation, in ignorance of the law, and, when told of its illegality, had expressed his regret. He was acquitted by the jury. This trial was promoted by the administration of Washington with earnestness, Hamilton lending his aid out of court. It was regarded as important, chiefly because M. Genet undertook to protect Henfield from trial, and to deny that his act was an indictable offence. It is the earliest important State trial in the United States, and was held in July, 1793.

The Betsey (Bee, 67). An American-built vessel, the *Hector*, was fitted out and commissioned at Charleston by Genet, and sent to sea as the French privateer *Vainqueur de la Bastille*; cruised and returned to United States, and was detained and dismantled by the United States Government at Wilmington, N.C.; and sailed thence, unarmed, as a foreign vessel. In Hayti, she was equipped and commissioned by the French authorities, in August, 1794, and brought a prize, the *Betsey*, into Charleston, in 1795. The District Court held, that, under the circumstances, the fitting-out, by aid of which the capture was made, was not in violation of our laws or rights.

The Brothers (Bee, 76). It was held that the repairing of the waist, and cutting two ports in it for guns, at a port of the United States, of a vessel fitted out and commissioned as a vessel of war when she entered, did not constitute an augmenting of her force, within the meaning of the act of 5th June, 1794. This was a claim by the British Consul for the restoration of a prize taken by the Port de Paix.

The Nancy (Bee, 73). The French privateer *Fonspertius* came to Charleston unarmed: leave to arm her was asked and refused. After a cruise, she returned with guns mounted and a prize. The court restored the prize; being satisfied that she did take on board the guns at Charleston to be used as her armament, and that the act was an illegal augmentation of force.

The Betsey⁽¹¹⁾ *Cathcart* (Bee, 292). The District Court restored the prize taken by the French privateer *Citoyen de Marseilles*, on the ground that the privateer had, before the capture, augmented her force by taking in additional guns at a port of the United States.

The Sloop Betsey (Dallas, iii. 6). It was held by the Supreme Court, that no foreign consul could adjudicate within the United States upon a prize; and that the United [544] States District Courts in Admiralty had jurisdiction to inquire, on petition of the owner of a vessel brought into our ports as prize to a foreign cruiser, whether the capture was made in violation of our own sovereign rights, and, if so, to restore the prize to the petitioner. The charge in this case was, that the captor, the French privateer *Citoyen Genet*, had been fitted out at Charleston, in violation of our rights and duties as a neutral sovereignty.

Le Cassius, previously *Les Jumeaux* (United States v. Peters, Dallas, iii. 121; and United States v. Guinet, Wheaton's⁽¹⁾ State Trials, 93). *Les Jumeaux* was originally a British cutter engaged in the Guinea trade, pierced for twenty guns, ten on a side; but only carrying four guns in broadside, and two swivels. Passing into French ownership, she came from the West Indies to Philadelphia in December, 1794, with a cargo, and entered at the custom-house as a merchantman. She was in a rotten state, and work was then begun upon her by carpenters. She was at this time owned by Le Maistre, the first French purchaser, and seven other Frenchmen, in joint stock. Her twenty ports, for which she was originally pierced, were opened, and some changes were made in her upper deck. These attracted the attention of the United States officers, who communicated their suspicions to the Secretary of War. He directed the recent

[²¹⁶ *Vide ante*, §§ 106, 107.]-D.

[¹ For Wheaton read Wharton.]-G.G.W.

[¹¹ For *Betsey* read *Betty*.]-G.G.W.

exclusive, only so far as respects offences against the municipal [539] laws of the State to which the vessel belongs. It excludes the exercise

equipments to be removed, and the vessel to be restored to the condition she was in, as respects warlike capacity, when she arrived. Under that order, her ports were closed, and the new ring-bolts in the deck were unfixed. She then sailed openly from Philadelphia in the same condition in which she arrived there, with her four guns and two swivels, in ballast, with an ordinary merchant-crew, and clearing at the custom-house for St. Domingo. Off the Delaware bank of the river, about sixty miles below Philadelphia, she took on board four guns, some muskets, and other articles, and a number of men. At the same time, the pilot-boat returned to Philadelphia, and made an effort to take down six more guns, by night. The public officers seem to have been very vigilant, stopped the boat, and seized the guns and the persons on board. These facts being brought to the attention of the government, orders were sent to follow the vessel and arrest her; and a militia force from Delaware was sent down in a cutter. Les Jumeaux was found to have a large crew on board, well armed, and her guns trained. Partly by the exhibition of superior force, and partly by a fraud practised upon the commander of the party, Les Jumeaux succeeded in getting to sea. This was Jan. 2, 1795.

The Secretary of War, Mr. Pickering, immediately issued an order, dated Jan. 6, 1795, to the governors of all the seaboard States, reciting the facts, with a description of the vessel, with directions to seize her and her commander, if she should come into any of their ports. Proceedings were had against the guns and tackle attempted to be taken down in the pilot-boat, under the clause of the act of 1794, which forfeits materials procured for the purpose of fitting out a vessel to cruise, &c.; and they were condemned and sold.

The government then procured an indictment against one Jean Etienne Guinet, a French resident in Philadelphia, on the charge of having been knowingly concerned in unlawfully fitting out and arming this vessel with the intent that she should be employed in the service of the French Republic to cruise against the subjects and property of the King of Great Britain, &c. Guinet pleaded not guilty. The trial was had in the Circuit Court of the United States for Pennsylvania, before Judge Patterson. The defence was placed chiefly upon two grounds,—*first*, that, if an unlawful act [545] had been done, the defendant was not cognizant of it; and, *secondly*, that there was not sufficient evidence that the vessel was intended by any one to cruise in the French service or against British property, or that the sending of guns on board, or the endeavoring to send, was done with such intent,—the vessel being a private merchantman, with no pretence of a commission, and no proof of an intent to get one from the French Republic. Judge Patterson instructed the jury that the converting a slightly armed merchantman into a vessel better suited and designed for hostilities, by adding to her warlike force, was as much a fitting-out and arming within the act as if the vessel had not been originally armed at all. He submitted to the jury whether the guns, &c., put on board secretly, in connection with the secret increase of her crew and the clearance at the custom-house as in ballast, could have been intended as merchandise, and, if not, whether they could have been any thing else than part of an equipment for war. As the United States were not at war, and France was, and the owners and managers were French, and the affair was secretly conducted, he said the jury were authorized to find that the intention was that she should be employed in the service of the French Republic to cruise against the nation with which she was then at war. The jury found a verdict of guilty, and Guinet was sentenced to one year's imprisonment and four hundred dollars fine.

This was the first conviction under the act of 1794, and the indictment was found in less than a year after the passage of the act.

Les Jumeaux proceeded directly from the Delaware to San Domingo,—then a French island,—attempting no acts of hostility on her passage, where she was sold to the French Government by her owners, Feb. 7, 1795, by a regular transfer; her armament was completed, and she was regularly commissioned as a ship of war of the French Republic, under the name of the *Cassius*. One Samuel Davis, an American, was commissioned as a lieutenant in the French navy, Feb. 10, and put in command of her; and she went upon a cruise. May 20, 1795, she captured the brig *William Lindsey*, and sent her into a French port, where she was regularly condemned as prize, by a prize court. Aug. 4, 1795, she came to Philadelphia, reported as a French vessel of war; and there Messrs. Yard and Ketland, the owners of the *William Lindsey*, libelled her in a civil suit in the Admiralty to recover damages for an illegal capture of that

of the jurisdiction of every other State under its municipal laws, but it does not exclude the exercise of the jurisdiction of other nations,

vessel. This suit was commenced Aug. 5, within twenty-four hours of her arrival. M. Adet, the French Minister, on the 9th August, complained of this seizure of a French vessel of war as a violation of the treaty with France and of sovereign rights accorded by all nations. The government replied, that, under our Constitution, the executive could not take a vessel out of the custody of a court, which held it regularly to try a question of private right. The United States Attorney suggested to the French Minister that he could himself release the vessel from judicial custody, in a regular and ordinary way, by giving security for her value, as this was a private suit for damages. This he refused to do; and, by letter of 18th August, he requested the United States Government to cause such security to be given. He added that the Cassius was on an important mission, which might fail by this arrest, and intimated the liability of the United States therefor. This proposal was rejected by the United States Government, on the ground that the question whether she was really and *bonâ fide* a public ship of war, or only ostensibly so, was a fact to be determined; and that, if the government intervened to release her, and permitted her to go to sea without satisfying itself as to the condition and rights of the vessel, when [546] she had once notoriously added to her armament in our ports, the question might arise whether the United States might not make themselves responsible for all the damage she might do and had done. The government was not willing, having such a vessel here in custody, to interfere actively to release her, until the facts as to her conversion into a French public ship should be determined, and the possible obligations of the government be settled to its own satisfaction.

In the District Court, at the same time, Messrs. Yard and Ketland had arrested Davis, the commander of the Cassius, to answer for the damages for the illegal capture of the William Lindsey. The French Minister demanded the release of the commander, as well as of the vessel. The British Minister also intervened, and urged the government to seize and retain the Cassius as having been fitted out in violation of neutrality. In this state of things, the government instructed the United States Attorney, Mr. Rawle, to watch the cause, on the part of the government, and to see that the fact of her being a *bonâ fide* French public ship be duly ascertained; and, if so, that the question of her consequent exemption from civil proceedings be suggested and presented, as well as the question whether the court could try the validity of her captures, if made *jure belli*, and sustained in a regular French prize court. So, as to the privilege of her commander, if duly commissioned in the French service.

Mr. Rawle accordingly filed a suggestion of her public character and consequent exemption in the District Court, and praying for her release, and for the discharge of Davis, on the same ground. It was suggested to the French Minister that this ground of defence might be interposed by him in the same court; but he declined to act in the judicial tribunals, and confined himself to the political department of the government. At the same time with this suggestion by the United States Attorney in the original cause in the District Court, Davis, the commander, filed, in the Supreme Court of the United States, a motion for a prohibition upon the District Court. In this motion, he alleged that he was a lieutenant in the French navy, and the Cassius a duly commissioned ship of the French navy; that he had captured the William Lindsey under his commission, as enemy's property, and that she had been duly condemned as a prize by a French prize court in San Domingo; and that the Cassius could not be proceeded against, under the law of nations and under the treaties between France and the United States, in a civil tribunal, to answer for such a capture, and that he had the like exemption.

This motion was fully argued, the alleged facts being admitted; and the court granted the prohibition. (*United States v. Richard Peters*, Judge, &c., Dallas, iii. 121.) This ended the proceedings in the District Court. The libel was dismissed on the 24th August.

It will be seen, that, so far, the questions in the courts did not at all turn upon the illegal outfitting of the vessel, or her violation of our neutrality. The suit was a private suit for damages, for a capture alleged to have been in violation of the laws of war. The reasons of the Supreme Court for granting the prohibition are not given in [547] the report; but it appears from the writ of prohibition and Mr. Rawle's report, that the ground of the decision was the obvious one, that, as the prize had been regularly condemned by a French prize court, and had never been within our jurisdiction, a civil tribunal of this country could not retry the legality of the capture under the laws of war, and decree damages against the capturing vessel or her

as to crimes under international law; such as [541] piracy, and other offences, which all nations have an equal right to judge and to punish.

commander. This is so plain, that it is said that the counsel for the libellants offered to drop the suit, satisfied that the prize had been so condemned and the vessel duly commissioned; and Mr. Pickering tells M. Adet (Oct. 1, 1795), that, if the counsel for the Cassius had suggested and proved in the District Court the facts he showed to the Supreme Court, the District Court would doubtless have dismissed the libel.

This ended the first stage of this now-celebrated case. As the vessel was arrested in this private suit within twenty-four hours of her arrival, no political question as to detaining her and refusing her asylum arose; and the only act of the government consisted in declining to interfere for her release, and in seeing that the facts were duly ascertained, and the law applicable duly considered by the court.

At the same time with the warrant to the marshal from the District Court to release the Cassius, another warrant was placed in his hands from the Circuit Court, requiring him to hold her to answer to an information in the latter court. The act of 1794 gave half the value of forfeited vessels to the informer. Mr. Ketland filed his information for the forfeiture, as it is technically called, *qui tam*, for the benefit as well of the treasury as of himself, on the ground of the illegal equipment of the vessel the year before. It was at this time settled law that such a proceeding is a private right of the informer, and that the executive government cannot interfere with such a suit by him. It can only decline to receive its half of the forfeiture, after it is decreed. M. Adet, Sept. 22, 1795, writes complaining of this second procedure against the Cassius; says he has been advised that the proceeding is malicious and vexatious on the part of Yard and Ketland, who are British subjects, though naturalized in the United States, and that the terms of the Circuit Court are held at long intervals, so that the suit must be long pending; suggests that her crew are deserting, and she of no service to the French Government; adding, 'I have ordered her to be disarmed: from this moment I abandon her to the government of the United States, under the reservation of referring the matter to the French Government.'

Mr. Pickering replied (Oct. 1), that the executive could not take this case, any more than it could the preceding, from the judiciary; and that the court had decided that it could not, in this penal proceeding, accept security for the Cassius in lieu of the vessel herself. He states the unquestioned fact, that the Cassius was, the year before, fully equipped and armed in the United States; and that the acts done had been already decided (*United States v. Guinet*) to be a violation of our laws of neutrality; and adds, that the French Minister ought not to be surprised that this matter should become a subject of judicial inquiry, and the effect of the subsequent alleged transfer to the French government a matter of judicial decision.

The United States Attorney was again instructed to intervene in this cause, as in the preceding, and to suggest for the consideration of the court the defence of the transfer to the French Government, and her commission by it; which he did, as before, in the form of a suggestion. At the next term of the court (April 15, 1796), the Secretary of State, Mr. Pickering, requests M. Adet to furnish the evidence of the *bonâ fide* transfer to the French Government, for the use of the United States [548] Attorney. M. Adet replies (April 22), declining to furnish proofs to the judiciary of a sale and payment, &c., saying that his relations are solely with the executive; and gives a certificate that she is a French public ship, duly commissioned, to which he afterwards, on request of the Attorney, added the date of her acquiring that character. Mr. Rawle fears this certificate will not be received as legal proof: but M. Adet declines to furnish any other, as beneath the dignity of his nation; and informs the Secretary of State (June 3, 1796), that the French Government had ordered him to ascertain, in conference with the Secretary, the reparation for the injuries and damages from the proceedings in the matter of this vessel: and the certificate he furnishes as a courtesy to the United States Government, and not for a cause in which the French Government has any further interest. At October term, 1796, the motion of the United States Attorney for a dismissal of the proceedings, on the grounds suggested, came up for argument. At the hearing, another question presented itself, under the statute law, whether the Circuit Court could take original cognizance of informations for forfeiture under the act of 1794; and the court dismissed the proceedings, on the ground that such proceedings must be instituted in the District Court. This dismissal was on the 15th October, 1796. On the 19th October, Mr. Pickering wrote to M. Adet, informing him of

Does it, then, exclude the exercise of the belligerent right of capturing enemy's property?

the dismissal of the suit, and adding, 'The ship, now for the first time out of judicial custody, is in the hands of the marshal, but ready to be delivered to your order.' To this letter M. Adet made no reply; leaving the vessel, now disarmed and out of commission, on the hands of the United States Government. She lay two years at the wharf, when the government, on the 22d November, 1798, gave notice to the French Consul-General of its intention to sell the vessel as perishable, if he knew no objection. He replied that he had no authority to act in the premises. The vessel was then sold at public auction, in this deteriorated state, for \$1,060; and the Secretary of State, Mr. Pickering, gave a bill of sale to the purchasers, dated 9th January, 1797,^[1] in which he recites the proceedings in the Circuit Court for a forfeiture; the abandonment of her to the United States by the French Minister, on the 22d September, 1795; her discharge from the custody of the court; the notice to M. Adet that the vessel was subject to his order, his failure to make any reply thereto; and the deterioration of the vessel,—as reasons for the sale.

This detailed account of the case has been given rather in deference to the great importance which an imperfect knowledge of the facts caused to be attached to it of late, in the questions arising out of the relations between England and the United States, than from the importance it will be found entitled to, after this full exposition of its history. It will be seen that the only judicial decision was, that a neutral cannot maintain, in the civil courts of his own country, a private suit against a foreign vessel of war, or her commander, to recover damages for an alleged illegal capture of his property, where the capture was made on the high seas, under a regular belligerent commission, in time of war, and had been adjudged lawful *jure belli* by a regular prize tribunal of the captor's country, and the prize was not within the jurisdiction of the neutral country. As the *Cassius* was taken into judicial custody within twenty-four hours of her arrival, and remained in that custody until after she had been disarmed and dismantled by the French Minister, and formally abandoned by him to the United States Government, with a reclamation for damages, the political department of the United States Government never had practically before it the question, [549] what it would do with an armed foreign vessel of war, within its control, which had on a previous voyage, before it became a vessel of war, and while it was a private vessel of French citizens, added warlike equipments to itself within our ports, in violation of our statutes for the preservation of our neutrality. When it came out of judicial custody, it was a stripped, deteriorated, and abandoned hulk, and was sold as such, by public auction. The only political action of our government consisted in this: It refused to interfere to take the vessel from the custody of the judiciary, but instructed its attorney to see that the fact of its being a *bonâ fide* vessel of war be proved and brought to the attention of the court, with a motion for its discharge from arrest, on the ground of its exemption as a public ship, if it turned out to be so. What course the executive would have taken as to the vessel, if it had passed out of judicial custody before it was abandoned and dismantled, does not, of course, appear. And that is the only question of interest to international law. Whether the government would have restored her armed, with asylum continued, or armed yet ordered out of the country with future asylum denied, or would have demanded a partial or entire disarmament,—all this must be left to conjecture.

For authorities on the political and judicial history of the *Cassius*, see *United States v. Guinet*, Wheaton's^[11] State Trials, 93. *United States v. R. Peters*, Dallas, iii. 121. *Ketland v. The Cassius*, Dallas, ii. 365. The correspondence between M. Adet and Mr. Pickering, and Mr. Rawle's report, in Waite's^[111] Am. State Papers (2d edit.), ii. 389-425. Mr. Pickering's despatch to Mr. Pinkney of Jan. 16, 1797, part relating to the *Cassius*: Waite's^[111] State Papers, ii. 136-138. Mr. Bemis's pamphlet on American Neutrality (Boston, 1864), and Letters to the Boston Daily Advertiser of Aug. 21 and 22, 1865. Letters of Historicus (Mr. Harcourt) to the London Times of Nov. 7, 1863, and April 14, 1865.

The Magdalena (Talbot v. Jansen, Dallas, iii. 133). The facts presented by this leading case on neutrality are these: The schooner *Fairplay*, an American vessel, was sent to Guadalupe in command of Talbot, a citizen of the United States, in November, 1793, and there sold to Redick, an American citizen temporarily residing there. Talbot and Redick both became naturalized at Guadalupe as French citizens, after a few days' residence; and the

[1 For 1797 read 1799.]—G.G.W.

[111 For Waite's read Wait's.]—G.G.W.

[11 For Wheaton read Wharton.]—G.G.W.

[542] This right of capture is confessedly such a right as may be exercised within the territory of the belligerent State, within the

schooner, now named *L'Ami de la Point à Petre*,⁽¹⁾ was authorized as a privateer, under command of Talbot, by the local French authorities, and sailed on a cruise. She went to the mouth of the Savannah River, and there furnished guns to an American vessel built and owned in Virginia, but then called *L'Ami de la Liberté*, commanded by one Ballard, a native of Virginia, who held an assignment of a power to command her given by the French Admiral in the United States, and recognized and authenticated by the French Consul at Charleston. Ballard had gone through the form of relinquishing the character of a citizen of Virginia in a court of that State, but had not been naturalized by French law or visited French territory, yet called himself a French citizen. The two vessels then cruised in company, and captured the brig *Magdalena*, a Dutch vessel, and brought her to Charleston. The Dutch were then at war with France, and at peace with the United States. Jansen, the master of the *Magdalena*, filed a libel to compel Ballard, who had the immediate charge of the brig, to make restitution. Talbot filed a claim to her as a prize duly captured by him in war. The cause came by appeal to the Supreme Court.

The Supreme Court held that Ballard was a citizen of the United States; that the [550] pretended authority to him, given or adopted by the French Consul at Charleston, to cruise in command of an American vessel lying in the United States, under the French flag, against commerce friendly to us, was invalid; that his taking guns on board in our waters for that cruise was a violation of our sovereignty; and that any prize made by him on that cruise, and brought into our ports, must be restored. As to Talbot, the court held, that, even assuming him to be a French citizen and his vessel to be a French privateer, his commission did not authorize him to arm and fit out an American vessel in our waters, and to make a consort of her, when she was not commissioned as a French cruiser, so as to exempt their joint prizes, brought into our ports, from being subject to our jurisdiction, and restored by our courts. The *Magdalena* was ordered to be restored.

The Alfred (Dallas, iii. 307). A vessel was built in New York for the purpose of being employed as a privateer in the then apprehended war with Great Britain. The controversy being adjusted, she was sent to Charleston, and there sold to a French merchant, who took her to a French island, where she was fully equipped and armed and commissioned as a privateer, sailed on a cruise, and captured the British merchant ship *Alfred*, and brought her to Charleston. When she left the United States, her equipments were imperfect, but calculated for war, though such as were then frequently used in merchant-vessels. The court held that this was not such a fitting-out in the United States, to cruise against friendly commerce, as authorized a restitution. She was lawfully fitted out in view of our own hostilities, and then sold *bonâ fide* to a private citizen of a nation engaged in war, who sent her out of the country unchanged, not to cruise, but to go to France, there to get authority and means to cruise.

The Phœbe Ann (Dallas, iii. 319). The court refused to restore a prize brought into our ports by a French privateer, which had previously made necessary nautical repairs in our ports, no other act being alleged against her as illegal, than taking out and replacing her guns, to facilitate her repairs.

The Exchange (Cranch, vii. 116). In this case, an opinion of the highest order of merit was delivered by Chief Justice Marshall. The *Exchange* was alleged to be an American vessel, the property of the libellants, lying in Philadelphia, in the unlawful custody of a Frenchman named Bégon, who assumed to control her; and an order of restitution was prayed for. Mr. Dallas, the attorney for the United States, intervened with a suggestion, that the vessel was a public armed ship of the Emperor Napoleon, duly commissioned in France as such, and visiting Philadelphia only as a port of necessity. The cause was argued by Pinkney and Dallas for the United States, and Harper and Hare for the libellants. The decision was, that, assuming the vessel to [551] have been once the property of the libellants, as she was now a public armed vessel of a friendly State, visiting our ports in pursuance of the understood permission of nations, the court would not try the question, by proceedings against the vessel or her commander, of the legality of the act by which she had been converted into a public ship; and that it was proper that the suggestion of her character and immunity should be made by the attorney for the United States.

Santissima Trinidad (Brockenbrough, i. 470. Chief Justice Marshall's Circuit decisions).

[¹ For *Point à Petre* read *Point à Pitre*.]—G.G.W.

[543] enemy's territory, or in a place belonging to no one: in short, in any place except the territory of a neutral State. Is the vessel of a neutral nation on the high seas such a place?

The act of 1794 is declaratory of the pre-existing law of nations, and intended to aid the executive in the enforcement of the law. Also, *Opinions of the Attorney-General*, vii. 367.

Alerta (Cranch, ix. 359). The French privateer *L'Épine*, being at New Orleans, increased her crew by secretly shipping several persons known to be Americans, went to sea and captured the Spanish brig *Alerta*, and sent her into New Orleans, as a port of necessity. On the petition of the owner, the court held that it had jurisdiction to inquire whether the prize was made by a vessel which had increased her force for the cruise, in violation of our sovereign rights. Restitution was made.

The Invincible (Wheaton, i. 238). A French privateer, captured by a British vessel of war, and captured again from the British prize crew by an American cruiser, was brought into a port of the United States for adjudication as prize. The original French owner claimed restitution, which was allowed, on payment of salvage to the American captor. The privateer was sold by consent, and the proceeds substituted. An American citizen intervened with a claim against the proceeds, on the ground that a vessel of his had been unlawfully captured by the privateer while under French command. The court decided that this question could not be inquired into; that where a privateer, duly commissioned as such by a belligerent State, comes into a port of a neutral power, the courts of that power cannot proceed against her or her officers, to obtain compensation for an alleged illegal capture made by her of a vessel of a citizen of that neutral power. The acts of the privateer, done in execution of the war-powers, have the same exemption from such procedure as those of a vessel of war the property of a State. There are a great many *dicta* in the opinion of Judge Washington, but that is the only point decided. The reasoning of the decision is, that, *prima facie*, a Court of Admiralty has the function of inquiring into violent dispossession of property at sea,—that, if it is suggested that the act was done *jure belli*, under authority of a State, the court may inquire into the validity of the authority or commission, so far as to detect piracy, and make sure that there is a sovereign responsibility for the act; but, if there be such, it cannot pass upon the question whether the capture, made *bonâ fide* under such authority, was in accordance with the rules of war. The court may, however, for other reasons, continue its inquiry, as if it is suggested that the capture was made in violation of the sovereign right of its own State, as when made within its waters, or by a vessel which had been fitted out or otherwise equipped for the cruise in violation of the rights of the State as a neutral sovereignty. This it may do, for the purpose of restoring a prize within its jurisdiction. But the court did not say, even as an *obiter dictum*, that the civil Court of Admiralty, in a private suit, could, even on such grounds, proceed against, condemn, and [552] sell a vessel duly commissioned and serving as a public ship of war of a foreign power.

Estrella (Wheaton, iv. 298). A Venezuelan privateer, having increased her crew at New Orleans, captured the Spanish brig *Estrella*, and sent her to New Orleans. On claim of the Spanish owner, the *Estrella* was restored.

La Amistad de Rues (Wheaton, v. 385). A Venezuelan privateer captured a Spanish vessel on the high seas, and sent her towards New Orleans. On her way, she was taken possession of by a United States ship, and carried into that port. She was there libelled by the Spanish owner in the Court of Admiralty for restitution, on the ground that the privateer which captured her had increased its force within the United States before the capture, in violation of the neutrality laws. The court decreed restitution, and made a further decree condemning the commander of the privateer to pay damages to the owner of the vessel for loss occasioned by the capture. An appeal from both decrees was taken to the Supreme Court. That court, on examination of the proofs, decided that the privateer had not violated our neutrality laws by the work done upon her, and dismissed the libel. This was, it will be seen, only a decision on a question of evidence; and by that decision, the whole suit failed. But Judge Story, in delivering the opinion of the court, thought proper to go beyond what was necessary for terminating the suit, and said, that, if the privateer had violated our neutrality laws, so as to have warranted the decree of restitution of the prize, that would not have justified the decree for damages. In explanation of this distinction, the learned judge shows that a civil court of a neutral country cannot adjudicate upon the validity of a capture *jure belli*, as between the

Distinction
between
public and
private
vessels.

[544] § 441. A distinction has been here taken between the public and the private vessels of a nation. In respect to its *public* vessels, it is

captor and the prize. Its only function is to vindicate the offended sovereignty of its own country. If a prize is taken in war, in violation of the territory or other rights of a neutral, the neutral may undo the act, and put the parties *in statu quo ante*, by releasing the prize and restoring it to the owner. And the owner of the prize may demand that. The neutral does this solely to vindicate its own sovereignty, and not with any regard to the validity or invalidity of the capture as between the parties. Into that, it need not and cannot inquire. The fact that a capture is made in violation of the rights of a neutral sovereign, is no legal objection to the capture, as between the parties. Consequently, the neutral court cannot award damages to the owner of the captured vessel, as for a capture made without probable cause, or as otherwise illegal. With reference to this distinction, Judge Story used the following language: 'The neutral nation should fairly execute its own laws, and give no asylum to the property unjustly captured. It is bound, therefore, to restore the property if found within its own ports.'¹ Beyond this it is not bound to interpose between the belligerents.' This clause of the opinion has been, apparently with no attention to the facts to which alone it refers, unwarrantably cited, in Parliament and elsewhere, during the recent controversy, as [553] an authority to the point that the political department of a neutral State is under no obligation to refuse asylum to a belligerent cruiser that has violated its neutrality. (Speech of Sir R. Palmer, Attorney-General, in the House of Commons, May 13, 1864.) That question was in no way before the court; the opinion had no reference to it; and, indeed, the question is not a judicial one.

La Concepcion (Wheaton, vi. 235). The Supreme Court ordered a restitution to the Spanish owner of a vessel taken by a privateer built, fitted out, manned and owned in the United States, and commanded by a citizen of the United States, and which had sailed thence to cruise under the Buenos Ayrean flag and commission. It was proved that, after one cruise, she went to Buenos Ayres, and that the capture was on a second cruise. But, there being no satisfactory proof of a sale at Buenos Ayres, the court held her to be still an American vessel, belonging to the same owner, and decreed restitution of her prize.

Bello Corrunes (Wheaton, vi. 152). A vessel owned and commanded by American citizens, and fitted out and armed in Baltimore, sailed thence, under Buenos Ayrean colors and commission, on a cruise against Spanish commerce; the commander assuming to have become a Buenos Ayrean citizen, but leaving his family domiciled in Baltimore. After a cruise, she went to Buenos Ayres, where a form of sale was gone through with, to another American, domiciled there. She then proceeded on a new cruise, and captured the Spanish vessel *Bello Corrunes*, which, after many adventures, including a cruise as consort to her captor, came into Newport, R.I., where she was libelled in behalf of the Spanish owner. The court held that the commander of the privateer was still an American citizen; that the sale at Buenos Ayres was only ostensible; that cruising as privateers against Spanish commerce by American citizens, under whatever foreign authority, was in violation of our treaty with Spain; and that, consequently, our courts would restore Spanish prizes made by such American vessels, when within our jurisdiction. There had been no condemnation of the prize by a Buenos Ayrean tribunal.

Santissima Trinidad (Wheaton, vii. 283). The facts as found by the court were, that a brig owned, built, and armed in the United States, and used as a privateer in the war with Great Britain, was, at the close of that war, sent under the American flag to Buenos Ayres, for sale. She was there sold to the Buenos Ayrean Government, and duly commissioned as a public ship of war of that State, and called the *Independencia*, and proceeded to cruise against Spanish commerce. She put into Baltimore; augmented her force, in violation of our statutes of neutrality, by enlisting persons not Buenos Ayrean subjects, and by other acts; and then captured the Spanish ship *Santissima Trinidad*, took cargo from her, came to Norfolk with this cargo on board, where it was taken out, and lodged in the public stores, while she was under repairs. While in the stores, it was libelled in behalf of the Spanish owners. The court decided—(1) That the clause in the treaty with Spain, prohibiting cruising against the commerce of either nation by citizens of the other, was confined to privateers; (2) That captures made in violation of our neutrality, by public vessels, were as much subject to restitution, when coming within our jurisdiction, as those made by privateers; (3) That, [554] as our government had recognized the existence of a civil war between Buenos Ayres and Spain, and avowed her determination

[¹ For ports. Beyond *read* ports; but beyond.]—G.G.W.

universally admitted, that neither [545] the right of visitation and search, of capture, nor any other belligerent right, can be exercised on

to remain neutral, the captures of either party would be treated with the same respect, although our government had not recognized the independence of Buenos Ayres; (4) That a condemnation made by a prize tribunal of Buenos Ayres of this property, after it had been libelled in this cause and was in custody of the court, would not prevent the court making restitution to the owners; and (5) That, whatever might be the exemption of the Independencia herself, this prize cargo, landed and stored at the request of her commander, was subject to this proceeding. The grounds for decreeing restitution were sufficient. Judge Story, in delivering the opinion of the court, said—which was not necessary to the decision of the case, as there had been illegal augmentation of force—that the sending of this vessel, fully armed and ready for use in war, under American colors, papers, and command, to Buenos Ayres, for a *bonâ fide* purpose of offering her there for sale in the market, as a commercial enterprise, though it subjected her to capture as contraband, would not be a violation of our national neutrality. He also suggested, that, in all cases where prizes came into our jurisdiction which had been made in violation of our national rights as neutrals, whether as being captured within our waters, or as made by vessels fitted out in our ports, the proceeding for restitution to the belligerent owner ought, on principle, to be instituted or sanctioned by the government itself, and not upon private responsibility, since the captures, as between the two belligerents, were valid, and only to be disregarded as violations of our national rights; but, as the practice had been uniform to proceed on private complaint, it would be recognized by the court; and the practice could, if found inconvenient, be altered by Congress.

Gran Para (Wheaton, vii. 471). The schooner *Irresistible* was built and owned in Baltimore, and sailed thence in 1818, the owner being in command, to Buenos Ayres. She had in her hold, entered as cargo, guns and other things suitable to fit her for hostile operations, and a crew of fifty men; clearing for Teneriffe as a merchant-vessel, and the shipping-articles being for a commercial voyage. At Buenos Ayres, a commission was obtained to cruise against Spain, the crew were discharged, and the greater part re-enlisted for the cruise. The day after she left Buenos Ayres, the captain produced a commission from General Artigas, as chief of the Oriental Republic, to cruise against Portugal, and sent back the Buenos Ayrean commission. She made several Portuguese prizes, took money from them, and returned to Baltimore, and deposited it in a bank in that city. A libel was filed in behalf of the owners of the *Gran Para* (one of the vessels captured), for the amount of money taken from her and on deposit. The opinion is by Chief Justice Marshall. The court thought it clear that the *Irresistible* had violated the neutrality acts, because the crew were ⁽¹⁾hired and ⁽¹¹⁾retained to go beyond the limits and ⁽¹¹⁾jurisdiction of the United States, with intent to be enlisted and ⁽¹¹⁾entered in the service, &c.; and because the owner 'fitted her out with intent that she should be employed in the service,' &c., of a nation at war with one with which the United States was at peace. The taking her armament in her hold in the form of cargo, and the clearance, shipping-articles, &c., the court regarded as mere devices to avoid the law; and that the intent, when she was sent from Baltimore, was that she should be employed to cruise in the belligerent service of [555] a State at war with a nation with which we were at peace. The more serious question was, whether this offence was not deposited by the transactions at Buenos Ayres and the entering on a second voyage there, as she had done, and intended to do, no act of hostility on her voyage out. There was no change of ownership at Buenos Ayres. The court says, 'This court has never decided that the offence adheres to the vessel, whatever changes may have taken place, and cannot be deposited at the termination of the cruise in preparation ^(iv) for which it was committed;' but held that, in this case, on the facts, the illegal preparation was for the cruise to be begun after a visit to Buenos Ayres, on which cruise this capture was made; and that, if under such circumstances, we should hold that a vessel sailing from our ports for hostile operations could, by visiting a belligerent port, getting a commission, going through the form of discharging and re-enlisting her crew, remove the taint of illegal preparation,—the whole of which was practically made in our port,—and become legitimate cruisers, 'the laws for the preservation of our neutrality would be completely eluded,' and our neutrality would be

[1 For 'hired read' "hired."]—G.G.W.

[11 For and read or.]—G.G.W.

[111 For and entered in the service, read or entered" into that service.]—G.G.W.

[iv For preparation read preparing.]—G.G.W.

board such a vessel on the high seas. A public vessel, belonging to an independent sovereign, is [546] exempt from every species of visitation

'a fraudulent neutrality, disgraceful to our own government, and of which no nation would be the dupe.' The captured money was restored.

Arrogante Barcelones (Wheaton, vii. 496). In this case, the court restored to the Spanish owner a prize of war brought into our jurisdiction, where the capture had been made by a vessel fitted out in the United States in violation of our neutrality acts, although there had been a regular condemnation in the prize court of the captor's country, the prize being still owned and controlled by the original wrong-doer; giving no opinion how it would be, in such case, if the prize were in the hands of a *bonâ fide* purchaser without notice.

Nereyda (Wheaton, viii. 108). A Spanish ship of war was captured by the privateer *Irresistible*, which was fitted out, owned, and commanded by American citizens, cruising under a commission from Artigas, as chief of the Oriental Republic of Rio de la Plata. The prize was taken to Margarita, an island of Venezuela, and there condemned as prize: Venezuela being an ally of the Oriental Republic. She was there commissioned as a Venezuelan privateer, and came to Baltimore. Here she was libelled in behalf of the King of Spain. A claim was put in by one Francesche, who alleged that he had bought her at the prize sale. The court held that this purchase was not proved, and that she was still in the hands and ownership of the owners of the *Irresistible*; that their title was not improved by the condemnation, if valid otherwise; and restored her to the King of Spain.

The Fanny (Wheaton, ix. 658). A vessel, fitted out as a privateer in Baltimore, owned and commanded by American citizens, sailed thence and cruised under a commission from Artigas, and captured Portuguese property, being cargo of the *Fanny*, which she took to St. Thomas, whence it was brought to Baltimore. Here it was libelled by the Portuguese owner, for restitution. One Levy, a resident of St. Thomas, claimed the cargo as having been bought by him of the captors at St. Thomas. The court held, that, if he was a *bonâ fide* purchaser, which they doubted, his title was not good against the owner, as he had bought it of persons in wrongful possession. In this case, it is to be observed that the capture, as between the government which commissioned the privateer and the Portuguese citizen, was valid *jure belli*; but the court held that the privateer, being owned and commanded by Americans, could not make a capture which courts of the United States would consider valid, even in the hands of a *bonâ fide* purchaser, before condemnation. [556]

United States v. Quincy (Peters, vi. 445). A Baltimore pilot-boat, called the *Bolivar*, of about seventy tons burden, belonging to an American citizen, had some repairs made upon her, new spars put in larger than before, and one port-hole cut suitable for a gun, and sailed for St. Thomas, with no other circumstance of suspicion than that she had in her hold one gun-carriage and slide, a box of muskets, and thirteen kegs of powder. She was commanded by the defendant, Quincy; and the owner, Armstrong, went in her. At St. Thomas, Armstrong procured funds, fitted her out as a privateer, under the name of *Las Damas Argentinas*, and sailed under the Buenos Ayrean flag,—Quincy still in command, and Armstrong on board,—and made captures of Spanish vessels. Quincy, returning to the United States, was indicted in the United States Court. The charge on which the question of law arose was, that he had been 'knowingly concerned in the fitting-out of a vessel called, &c., with intent that such vessel should be employed in the service of,' &c. The clause of the statute is in these words: 'If any person shall, &c., be knowingly concerned in the furnishing, fitting-out, or arming of any ship or vessel, with intent that such ship or vessel should be employed in the service of,' &c.

The case came to the Supreme Court on the question what instruction ought to have been given to the jury. There were but two points of international interest,—the *first*, as to the fitting-out and arming of the vessel; and the *second*, as to the intent with which she was fitted out. The counsel for the defendant contended that the offence was not committed, if the vessel, at Baltimore and on her voyage to St. Thomas, and on her arrival there, was not armed, or at all prepared for war, or in condition to commit hostilities; that the offence consisted either in arming a vessel, or in fitting out an armed vessel. This instruction was refused; and the Court ruled, that either fitting-out or arming was an offence; and that it was not necessary that the vessel fitted out should be an armed vessel, or in condition to commit hostilities; and that the offence might have been committed, although the jury should find that 'the equipments were not complete within the United States, and that the cruise did not actually commence until men were enlisted and further equipments made at St. Thomas, and

and search, even within the territorial jurisdiction of another State; *à fortiori*, must it be exempt from the exercise of belligerent rights on the ocean, which belongs exclusively to no one nation.^(a)²¹⁷

although the vessel had no large gun, no flints, nor any cannon or musket balls, and that the muskets and sabres were nailed up in boxes during the voyage.'

On the second point,—that of the intent,—there was evidence tending to show that the owner had no funds at Baltimore, and no contract for any at St. Thomas, or sure means of getting any there, for fitting the vessel out as a privateer; and that his ability to fit her out there depended upon his getting the funds, which he did get, in fact, only after exertions, and in pursuance of no pre-existing contract or arrangement. On these facts, the counsel for the defendant asked the court to instruct the jury that the offence was not committed, if, when the vessel was fitted out, the owner had 'no present intention of employing said vessel as a privateer,' but intended, when he equipped her, to go to the West Indies 'in search of funds with which to arm and equip said vessel to prepare her for a cruise,' &c.; or if he had 'no fixed intention to employ her, &c., but only a wish to employ her, &c., the fulfilment of which wish depended on his ability to obtain funds in the West Indies for the purpose of arming and preparing her for war,' &c. The instructions ordered by the court to be given were, that there must have been in the United States a fixed and present intention, not contingent or conditional, to employ her in cruising; and that, if there was not such fixed and present intent, the offence was not committed by a mere intent [557] to go to the West Indies, and endeavor to procure funds to prepare her for such employment, contingent on getting the funds. On the other hand, if there was that fixed and present intent so to employ her, the offence was committed, although it was liable to be defeated, and was known to be liable to be defeated, by a failure to get the necessary funds in the West Indies.

In the course of the reasoning of Mr. Justice Johnson in delivering the opinion of the court, it is said that, assuming the defendant's position to be sound, which supposes the statute to contemplate two classes of offenders,—first, those who do or attempt to do the act, and, second, those who are privily concerned in the doing of the act by the first class,—and to require, by its words, that the first class must arm as well as fit out, still 'an attempt to do an act does not imply a completion of the act, nor any definite progress towards it. Any effort or endeavor to effect it, will satisfy the terms of the Act.' The court considers the varied phraseology of the statute—embracing the doing, endeavoring to do, or being knowingly concerned in doing, the prohibited acts—'was intended to embrace all persons, of every description, who might be engaged, directly or indirectly, in preparing vessels with intent that they should be employed in committing hostilities against any power with whom the United States were at peace.' And, on the other point, the reasoning of the court is, that the statute does not intend to prohibit armed vessels belonging to citizens of the United States from sailing from the United States because there are foreign wars, but only requires that the parties shall give security that they shall not employ them in the manner prohibited. The offence of fitting them out, whether armed or not, consists in the intent with which the fitting-out is done. The intent 'is the material point on which the legality or criminality of the act depends, and decides whether the adventure is of a commercial or warlike character.'⁽¹⁾

Kenneth⁽¹¹⁾ v. *Chambers* (Howard, xiv. 38). An inhabitant of Texas made a contract to convey land in that country to citizens of the United States, in consideration of advances of money made by them in the United States, to enable him to raise men and procure arms to carry on the war with Mexico; the independence of Texas not having at that time been acknowledged by the United States. After the recognition of the independence of Texas, these citizens endeavored to compel the performance of this contract. The Supreme Court held that the contract was, when made, contrary to our national obligations to Mexico, and violated our public policy, and could not be enforced in our courts, even after recognition of independence.

United States v. Kazinski (Law Rep. viii.⁽¹¹⁾ 254). The offence, under the second section

(a) *Vide ante*, §§ 105-107.

[²¹⁷ See note 63, *ante*, Exemption of Public Vessels; note 66, *ante*; and note 67, *ante*, Impressment of Seamen.]—D.

[¹ The sentences in quotation marks do not follow the text of *United States v. Quincy*.]—G.G.W.
 [¹¹ For *Kenneth* read *Kennett*.]—G.G.W. [¹¹¹ For *viii* read *xviii*.]—G.G.W.

[547] In respect to *private* vessels, it has been said the case is different. They form no part of the neutral territory, and, when

of the act, is in hiring or retaining persons in this country to go beyond the jurisdiction for the purpose of enlisting. It is not a crime for a citizen to leave the country for the purpose, or merely to transport others who go voluntarily for that purpose. See also Opinions of Attorneys-General, iv. 336.

IV. POLITICAL HISTORY OF THE SUBJECT SINCE THE PASSAGE OF THE NEUTRALITY ACTS.

During the wars for independence between the South American provinces and Spain and Portugal, the powers involved were all maritime; and there was a strong sympathy in the United States in favor of the provinces, not only as being American and republican, with constitutions modelled on our own, but as struggling against government by remote monarchies, in whose powers they had no part, and with which we had little connection and no sympathy. The large and rich commerce also of Spain and Portugal offered a temptation to persons of a freebooting tendency. [558] Vessels were constantly sent from the United States, which were afterwards found engaged under the South American flags, as privateers. Sometimes their prizes came into our jurisdiction, and sometimes the persons concerned returned here. Frequent causes arose in our courts, either in the way of criminal prosecutions, or of civil proceedings for the restoration of prizes. There was less cause, however, for executive action, as we had now what we had not during Washington's difficulties,—statute laws on the subject, a settled course of judicial proceedings, and an adequate civil force; and it had been settled that restitution of prizes could be made in private suits, without governmental authorization. The number of vessels restored by such suits to Spanish and Portuguese owners, as having been captured by vessels illegally fitted out here, was very large.

The Spanish Government complained that a military expedition had been fitted out in New York under Miranda, in 1806, to operate against Spain in South America. There seems no doubt that this might and ought to have been prevented by us. They also complained that privateers were largely fitted out, in the Southern States, to cruise against Spanish commerce under provincial flags. It has been seen that a new clause was introduced into our neutrality acts, at the request of the Spanish Minister, so as to include the provinces which were in civil war with Spain. The correspondence admits the disposition of the executive to do its duty in respect to these privateers, but complains that the results were unsatisfactory, and the evil not effectually repressed. The United States Government's replies are to the effect that, having made satisfactory laws and provided adequate tribunals, and no case of neglect or refusal to do its full duty in preventing the outfitting of such vessels, or the restitution of prizes taken by such vessels, being pointed out, the United States is not liable for the acts of its citizens, or of privateers fitted out in its territory, if the acts were done beyond its jurisdiction. As many as seven citizens were prosecuted, by authority of the government, for violation of neutrality; and stringent orders were issued to the proper officers in all the ports. It is not to be denied that they were often eluded, and that great wrongs were done by individuals. The United States had, at this time, large claims against Spain, arising out of the wars of the French Revolution. The result of a long correspondence was the Spanish treaty of 22d February, 1819. This treaty, which included the cession of Florida, was expressed as intended to be a 'reciprocal renunciation of all claims for damages or injuries,' up to the time of signing. It expressly includes (Art. IX) a renunciation, on the part of Spain, of 'all injuries caused by the expedition of Miranda, fitted⁽¹⁾ out and equipped at New York;' and of 'all claims of Spanish subjects upon the government of the United States arising from unlawful seizures at sea, or within the ports and territories⁽¹¹⁾ of the United States;' and of 'all claims^(1v) of subjects of His Catholic Majesty upon the government of the United States, in which the interposition of His Catholic Majesty's Government has been solicited,^(v) or which may have been made to the Department of Foreign Affairs of His Majesty, or to his minister in the United States.' As to Spain, then, it is understood that the whole subject was satisfactorily settled by a reciprocal renunciation of claims, as offsets, and no decision has ever been or can now be had,

[¹ Delete quotation mark before reciprocal and insert before all.]—G.G.W.

[¹¹ For Miranda, fitted read Miranda, that was fitted.]—G.G.W.

[¹¹¹ For territories read territorial jurisdiction.]—G.G.W.

[^{1v} For all claims read all the claims.]—G.G.W.

[^v After solicited a clause is omitted.]—G.G.W.

within the territory of another State, are not exempt from the local juris[548]diction. That portion of the ocean which is temporarily political or judicial, as to [559] whether, for any such claims, the United States were actually liable. (Letters of Señor Onís, of January, 1817; 24th October and 16th November, 1818; and 7th⁽¹⁾ February, 1819; and of Mr. Adams, of 13th February, 1819.)

Our relations with Portugal were not adjusted to her satisfaction. On the 20th December, 1816, M. Correa de Serra presented to Mr. Monroe, Secretary of State, a strong case of violation of neutrality, in Baltimore. He was careful to acquit the executive of neglect or unwillingness, and disdains asking for compensation, but suggests additions to our neutrality laws of a preventive character. These were at once acceded to by the executive, and passed by Congress in the act of 3d March, 1817. M. de Serra always expressed himself satisfied with the legislation adopted. (Letter of 4th February, 1819, and Mr. Adams's reply of the same month.) March 8, 1818, M. de Serra presented cases of vessels captured by one of these cruisers, which had escaped from the United States before the passage of the act. To this letter, Mr. Adams, Secretary of State, replied (letter of 14th March, 1818), that, as the United States had 'used all the means in their⁽²⁾ power to prevent the fitting-out and arming of vessels,' and had 'faithfully carried into execution the laws enacted to preserve inviolate the neutral obligations⁽³⁾ of the Union,' it '⁽⁴⁾could not consider itself bound to indemnify individual foreigners for losses by capture⁽⁵⁾ over which the United States have neither control nor jurisdiction. For such events, no nation can in principle, nor does in practice, hold itself responsible.' He reminds the minister that the Admiralty Courts will and do restore prizes within their reach, captured in violation of our laws, and that individuals will be and have been prosecuted criminally. Mr. Adams, Nov. 20, 1818, requested the Portuguese Minister to furnish a list of the persons chargeable with violations of our laws to the injury of Portugal, and of the witnesses against them, for the purpose of prosecution; and prosecutions were ordered by the government in cases which seemed sustained by the evidence.

Early in 1819, the Portuguese Minister brought forward a grievance of a new character. This was, that the flag of José Artigas, chief of the Banda Oriental, was allowed to be shown in Baltimore on prizes sent in there; and that privateers of that flag were recognized as belligerents, when, as he alleged, Artigas had no seaport in South America under his control. In November of that year, he presented lists of injuries done to fifty Portuguese vessels, and declared, that, in one port alone of the United States, twenty-three ships had been fitted out as privateers.

July 16, 1820, the Portuguese Minister proposed that a commission be appointed by the two powers to confer and agree on what reason and justice demanded. This proposal was declined (letter of 30th September, 1820), upon the ground, that, no charge or neglect or refusal being made against the government, and the government being satisfied that it had done its duty, the United States could not be responsible for acts done beyond its jurisdiction and control; that criminal prosecutions were duly made by the government, on the presentation of proof, and that the civil courts would make restitution of prize property within their reach; and that, beyond these remedies, no [560] nation was required to make compensation, which had done its duty in providing laws and enforcing them.

This demand for a commission was renewed in 1822, and declined on the same grounds. It was again renewed in 1850, and was met with an answer by Mr. Clayton, Secretary of State, 30th May, 1850, affirming the position of the United States Government in 1820 and 1822, and declining to re-open the discussion. There was a rejoinder by the Portuguese Minister, of Nov. 7, 1850. Here the correspondence closed.

There can be no question, that, for a time, violations of our laws by the fitting-out of vessels in our ports, especially in Baltimore and other Southern cities, to cruise against Portuguese commerce, were frequent and open, and that Portugal suffered greatly from them. On the other hand, it is true that the United States made special laws, satisfactory to Portugal, at her request; prosecuted criminally both citizens and foreigners; made restitution of prizes; and suppressed by force the establishments of Amelia Island and Galveston, beyond our territory; and that the Portuguese Minister did not allege that the executive failed of its duty,

[¹ For 7th read 9th.]—G.G.W.

[² For their read its.]—G.G.W.

[³ For neutral obligations read neutral and pacific obligations.]—G.G.W.

[⁴ Delete quotation mark before could and insert before consider.]—G.G.W.

[⁵ For capture read captures.]—G.G.W.

occupied by them forms no part of the neutral territory: nor does the vessel itself, which is a movable thing, the property of private indivi-

but, on the contrary, spoke of its 'conscientious earnestness.' It seems, also, from the reports of claims made in 1850 (*vide infra*), that these measures of repression were successful, as scarcely a case of claim was made after 1820. He suggested no remedy or means to be adopted; and the government took the position, that it had acted in good faith, and with due diligence, in prosecuting all persons properly charged with offences, on probable testimony; and that the courts were open and effectual to give redress in the way of restitution, whenever the law of nations required it. On the subject of the permission of the Artigas flag, nothing appears to have been done by our government; yet the subsequent correspondence does not seem to refer to it. Artigas had possession of the entire republic of Uruguay, including Monte Video and other ports, when he was at war with Portugal. The Portuguese Minister probably refers to a condition he may have been reduced to, by stress of war, at some particular period of the contest.

The real difficulty seems to have been that the public sympathy for the South American struggle was so strong and general, and the appeals to enterprise and cupidity so tempting, that the matter got, for a time, quite beyond the repressing powers which were brought to bear; and the Portuguese Government either was not willing to, or could not justly, charge the government with intentional remissness, at the time. This furnished the United States with a position for refusing to agree to a commission, whose sole duty, on that state of relations, would be to determine whether anything, and what, should be paid by the government for Portuguese losses. The charge of remissness made first in 1850, after thirty years, by another generation of diplomatists, was tardy and inconsistent. The diplomatic position of the United States seems to be defensible, within its exact limits; yet, in point of fact, Portuguese subjects suffered great wrongs from citizens of the United States, committed in violation of our laws and of their rights.

In 1848, during an armistice in the hostilities between Denmark and the Germanic [561] Confederation, the latter power fitted out a steamer at New York to be used as a ship of war. To the objection of the Danish Minister, the representative of the Confederation replied that the vessel had been ordered independently of this war, and was intended for defensive purposes during the armistice. This was not deemed satisfactory by the United States Government; and she was not permitted to proceed to Germany until security had been given that she should not be employed as a vessel of war during hostilities with Denmark, including all periods of armistice. (*Annuaire des deux Mondes*, 1852-3, p. 485. Ex. Doc. 31st Cong. No. 5.⁽¹⁾ Opinions of Attorneys-General, v. 92.)

During the Crimean war, in 1855, the British Consul at New York furnished affidavits charging that a large vessel, called the Maury, fitting out there, was intended to cruise under the Russian flag against British commerce. On the receipt of these documents, the United States Attorney, although he did not think the evidence credible, yet, in order to give opportunity for a complete examination, libelled the vessel, and placed her in the custody of the marshal. After a full examination, the British Consul was satisfied, and withdrew the complaint. (Senate Doc. 34th Cong. 238.)⁽¹¹⁾

In 1866, on an affidavit of the Spanish Consul, charging that the steamer Meteor was fitted out to cruise against Spanish commerce, under the Chilean flag, she was arrested at once by the United States Attorney at New York, without waiting for authority from Washington. A libel was filed, under like circumstances, in Boston, the same year, against the steamer Cherokee. Indeed, it is the practice for the local law officers of the United States to treat the Neutrality Acts like other penal statutes, and, on exigencies, to libel and arrest vessels about to depart, upon affidavits showing only probable cause. And, where the Department of State acts, its test is only probable cause. (Mr. Seward's letters, in the cases of the Meteor and Cherokee.)

SUMMARY.

The results of the legislative, executive, and judicial proceedings in the United States on this subject, may be stated, in substance, thus:—

The United States acknowledges an obligation to preserve impartiality between foreign

[¹ For Ex. Doc. 31st Cong. No. 5 read H. Ex. Doc. 31st Cong. 1st sess. No. 5.]—G.G.W.

[¹¹ For Senate Doc. 34th Cong. 238 read Senate Ex. Doc. No. 35, 34th Cong. 1st sess. 238.]—G.G.W.

duals, [549] form any part of the territory of that power to whose subjects it belongs. The jurisdiction which that power may lawfully

belligerents. Overt acts of hostility committed within its jurisdiction, being violations of its own sovereign authority, it will repress, on its own account. It will also prevent or punish them, as a measure of justice to foreign interests lawfully within our jurisdiction and protection which suffer from them. One mode of redress is to take possession of any property thus captured, and found within our jurisdiction, and restore it to the injured party. Where restitution cannot be made, the government may make the aggression a cause of complaint against the power responsible for it, and obtain compensation for the benefit of the party injured. Our government has not been called upon to meet the question, what its own liability would be in case it did not succeed in obtaining compensation from the power making the aggression, having itself failed to prevent the act, in a proper case, not from neglect or unwillingness at the time, but from want of an adequate force; and it is no part of the purpose of this historical note to suggest rules to meet possible cases.

The government also recognizes its obligation to prevent a belligerent, or its own people, from doing proximate acts of hostility within our territory. As violations of our own sovereignty, or as endangering our own peace, such a case is purely one of internal policy; but, as respects others, this obligation arises out of the fact, that, as to such matters, it is impossible to preserve impartiality, and to create a balance of opportunities for the respective belligerents. Either one that suffers, therefore, from such an act, may complain, that, when permitted, it is a violation of impartiality as well [562] as of neutrality. It is assumed that a line can be practically established reasonably to distinguish proximate acts of hostility from the rights of trade and asylum, and is so established by the law of nations. Our obligation arises from the law of nations, and not from our own statutes, and is measured by the law of nations. Our statutes are only means for enabling us to perform our international duty, and not the affirmative limits of that duty. We are as much responsible for insufficient machinery, when there is knowledge and opportunity for remedying it, as for any other form of neglect. Indeed, a nation may be said to be more responsible for a neglect or refusal which is an imperial, continuous act, and general in its operation, than for neglect in a special case, which may be a fault of subordinates.

As to what shall constitute unlawful proximate acts, our rule has been to prohibit the enlistment here of men for belligerent service, or a contract made here to go abroad and there enlist; or the accepting here of a belligerent commission for service abroad. But we allow a vessel of war to enlist here subjects of its own sovereignty, transiently in the United States, to serve on board that vessel.

In case of vessels already armed and commissioned by a foreign belligerent, whether public vessels or privateers, they shall not in our ports increase their capacity for hostile purposes, whether of offence or defence. This rule may be violated by enlisting men, or by adding to the physical efficiency of the vessel in a respect which is not purely nautical, and such as a merchant-vessel would not require. We have not found it necessary to restrict the stay of belligerent cruisers, or their prizes, in our waters, to less than the terms of asylum usually allowed to public vessels in time of peace.

As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. If any person does any act, or attempts to do any act, towards such preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty, without reference to the completion of the preparations, or the extent to which they may have gone, and although his attempt may have resulted in no definite progress towards the completion of the preparations. The procuring of materials to be used, knowingly and with the intent, &c., is an offence. Accordingly, it is not necessary to show that the vessel was armed, or was in any way or at any time, before or after the act charged, in a condition to commit acts of hostility.

On the point of the intent, more nicety and discrimination are necessary. If the person charged has himself the control of the vessel, to put her into foreign belligerent service, the question of the intent to employ her is simple. If he has not, he is still chargeable with doing acts, or being knowingly concerned in the doing of acts, of or towards the preparation, with the intent that the vessel shall be so employed, though others may control her during the preparations.

exercise over the vessel on the high seas, is a jurisdiction over the persons [550] and property of its citizens; it is not a territorial

But the intent must be that she shall be so employed; and the intent must be a fixed and present intent, and not a wish or desire merely that she may be. If there is a contingency, it must, to exculpate the party, be one which forms a condition precedent to the intent, and not merely a condition precedent to the employment, or a condition subsequent which may defeat the intent. Thus, if the owner sends a vessel, not completely ready for hostile operations, with instructions to her commander to complete her preparation and obtain letters of marque in the port of destination, and, in [563] case of failure in obtaining the commission and equipment, to take a cargo and return, he would doubtless be guilty; for he has entered on the execution of his purpose, and those are only the ordinary contingencies in all employments, by which they may be defeated. But the purpose to which he shall put his vessel after her arrival may depend on circumstances so entirely contingent and fortuitous, as to relieve him from the charge of a fixed intent at the time he sends her out.

It will be seen at once, by these abstract definitions, that our rules do not interfere with *bonâ fide* commercial dealings in contraband of war. An American merchant may build and fully arm a vessel, and supply her with stores, and offer her for sale in our own market. If he does any acts, as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case, the extent and character of the equipments is as immaterial as in the other class of cases. The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent. In the former case, the ship is merchandise, under *bonâ fide* neutral flag and papers, with a port of destination, subject to search and capture as contraband merchandise by the other belligerent, to the risks of blockade, and with no right to resist search and seizure, and liable to be treated as a pirate by any nation, if she does any act of hostility to the property of a belligerent, as much as if she did it to that of a neutral. Such a trade in contraband, a belligerent may cut off by cruising the seas and by blockading his enemy's ports. But, to protect himself against vessels sailing out of a neutral port to commit hostilities, it would be necessary for him to hover off the ports of the neutral; and, to do that effectually, he must maintain a kind of blockade of the neutral coast, which, as neutrals will not permit, they ought not to give occasion for.

No cases have arisen as to the combination of materials which, separated, cannot do acts of hostility, but, united, constitute a hostile instrumentality; for the intent covers all cases, and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arming, or of procuring materials for these acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise.

As to penalties and remedies, parties guilty are liable to fine and imprisonment, and the vessel, her apparel and furniture, and all materials procured for the purpose of equipping, are forfeit. In cases of suspicion, revenue officers may detain vessels, and parties may be required to give security against hostile employment; and the President is allowed to use the army and navy or militia, as well as civil force to seize vessels, or to compel offending vessels, not subject to seizure, to depart from our ports. What vessels shall be required to depart, is left to the judgment of the executive. If [564] a prize, captured by a vessel which has been fitted out in violation of the laws, is within our control, the courts will restore her to the owners, on their application; and it is not necessary that the proceedings should be instituted by the government. If the prize is in the hands of the original wrong-doer, it will be restored, notwithstanding a condemnation otherwise valid; and a condemnation decreed after seizure for restitution, will be disregarded. If a prize so captured has become the property of the belligerent nation, and

jurisdiction. Being upon the ocean, it is a place where no particular nation has jurisdiction: and where, consequently, all nations may equally exercise their international rights.^(b)²¹⁸

been taken into its public service, as a vessel of war, it will not be seized for restitution. It has not been decided what will remove the taint of an illegal outfit, so as to exempt a vessel's prizes from restitution; but it has been decided that a non-belligerent voyage to a belligerent port, and a completion and commissioning there, with subsequent cruising, do not of themselves necessarily constitute a separate enterprise, so as to remove the taint.

A privateer, being private property, is liable to be seized and sold by civil process, in municipal tribunals, for violation of municipal laws, like any other private property. Her commission, being a mere permission to make captures, which she may exercise or not at her option, does not put her into the class of vessels in the service of a sovereign State. But the government giving her the commission is responsible for her captures made under it *jure belli*, and has the exclusive right to adjudicate upon their validity, as in case of captures made by a public ship. If we inquire into such captures, it is only for the purpose of redressing violation of our own sovereign rights. In such case, we make no distinction between those made by privateers and those made by public vessels; and we simply undo the illegal act, by releasing the prize. We do not undertake to secure compensation to the belligerent for an illegal capture, in the way of damages; for we do not inquire into the validity, *jure belli*, of the capture, as between the parties. That would be not vindicating our own sovereign authority, but adjudicating on prize. The restitution is irrespective of the validity of the capture *jure belli*, and for another reason. But vessels of war in the public service are considered as belonging to the class of public sovereign instrumentalities, and are exempt from seizure by judicial tribunals. Our government will not undertake to seize and proceed against such a vessel, by a judicial process in our courts, for a violation of our laws committed before she became a public ship of war. If such a vessel is proceeded against, either in the way of arrest, or dismissal from port, or refusal of a right to enter, or compelling her disarmament, it must be a political act of the government, on its international responsibility, and not as a judicial remedy for a breach of municipal law. It is not remembered that any instance has occurred where the United States has felt bound or entitled to resort to such measures against a public ship. The truth is, such a case would usually be settled by diplomatic arrangement between the government and the minister of the nation to which the ship belonged, without the necessity of overt acts against the ship. The case of the *Cassius* came near presenting this question to our government, but, as we have seen, resulted otherwise. In some cases of judicial proceedings arising out of the South American war, commissions as ships of war were set up; but no vessel was adjudged forfeit where the court was satisfied that it was *bonâ fide* a public vessel, owned and commissioned by an acknowledged nationality.

THE BRITISH FOREIGN ENLISTMENT ACTS.

Before 1819, there were no Acts of Parliament in aid of British neutrality. There were statutes prohibiting enlistments in England in the service of foreign States, but [565] not going beyond that. By the treaty with Spain of 1814, Great Britain engaged not to allow arms or warlike articles to be furnished to the South American provinces then in insurrection. But, after the close of the European wars in 1815, soldiers and sailors were enlisted and organized openly in England to serve the South American provinces, and sailed in armed ships from British ports. Spain complained of this. The existing acts prohibited enlistment into the service of recognized governments only. The administration then proposed the act of 1819,

(b) Rutherford's Inst. vol. ii. b. ii. ch. 9, § 19. Azuni, Diritto Maritimo, Part II. ch. 3, art 2. Letter of American Envoys at Paris to M. de Talleyrand, Jan. 17, 1798: Waite's⁽¹⁾ American State Papers, iv. 34.

[²¹⁸ See also Ortolan, Dipl. de la Mer, liv. ii. ch. 10, tom. i. p. 21. Woolsey's Introd. § 64. Heffter, Europ. Völker. § 79. Hautefeuille contends for the same exemption in private vessels of commerce as in public ships of war, as far as territoriality is the basis of exemption. Droits des Nat. Neutr. tom.⁽¹¹⁾ vi. ch. 1, § 1. See also note 66, *ante*; and note 67, *ante*, on Impressment of Seamen.]—D.

[1 For Waite's read Wait's.]—G.G.W.

[11 For tom. read titre.]—G.G.W.

Usage of
nations sub-
jecting ene-
my's goods
in neutral
vessels to
capture.

[551] § 442. Whatever may be the true original abstract principle of natural law on this subject, it is undeniable that the constant usage

which has generally been known as the Foreign Enlistment Act. It extended its prohibition of belligerent operations so as to include the service of revolted provinces, or of any people assuming the exercise of powers of government. The administration had before it the American acts of 1794 and 1818, with their diplomatic and judicial history. The advocates of the bill, especially Mr. Canning, passed the highest eulogium upon the American system of neutrality, as initiated by Washington, with the support of Hamilton and Jefferson, and interpreted by the Supreme Court. The opposition to the bill, led by Sir James Mackintosh, was not to its abstract character, but because it had, at the time, the appearance and effect of aiding Spain by a new prohibition of assistance to her colonies in their revolt. This was true; but the general argument on the abstract right of such a measure was unanswerable. The British act of 1819 is almost in the terms of the American acts. A striking difference, to which late events have given importance, is the omission of the preventive powers of the tenth and eleventh sections of the American act. As these had been specially added, for grave reasons, this omission must have been intentional. They authorize local revenue officers to seize vessels, in exigencies, for probable cause, and to require security. We have seen (*ante* p. 468) that it is the practice for the local law-officers also of the United States, on probable cause, to libel and arrest vessels for alleged violations of this act, without waiting for authorization from the seat of government. Under the British act, on the contrary, it has not been the practice for the local officers to proceed by way of prevention or probable cause. Indeed, when that was done by the government itself, in the very strong case of the rams (*infra*, p. 479), it was thought to have assumed a grave responsibility.

In 1823, the Whig party, under the lead of Lord Althorp, endeavored to procure a repeal of the act, but were unsuccessful.

In 1826, in reply to the remonstrances of Turkey that English aid was given to the revolutionists in Greece, Mr. Canning said that arms might be sent from England as merchandise, and that it was 'only when the elements of armament are combined that they come within the purview of the law; and, if that combination does not take place until⁽¹⁾ they have left this country, we cannot interfere⁽¹¹⁾ with them.' (Hansard, xxiv.⁽¹¹¹⁾ 209.) Here Mr. Canning was evidently speaking only of stopping the exportation of articles, on the sole ground of their being contraband of war. Such are not, in themselves, liable to be so stopped. He did not have under discussion, nor refer to the question, whether a person violates the act who sends out parts of an armament, with the intent that they shall be combined. It would seem that the answer must depend upon whether, in his act, his intent is to do in England his part of the fitting-out of a vessel to cruise against friendly commerce. If a part of the actual fitting is done to the vessel there, with that intent, it would seem that he must be guilty. On this point, it is noticeable that the British statute forfeits only the vessel and such materials, &c., [566] as 'belong to or are on board.' The American act forfeits also every thing that 'may have been procured for the building and equipment.' The argument suggested by this difference might, in a close case, under the British act, avail participators, and may tend to show that it is designedly less stringent than the American in this respect, as well as in regard to preventive powers.

In 1835, Great Britain entered into the quadruple alliance with France, Spain, and Portugal, in favor of Queen Isabella's right to the Spanish throne. An Order in Council was made relaxing the provisions of the act of 1819, so far as to exempt from its penalties British subjects entering the service of Isabella; and a Spanish legion was formed of British subjects, commanded by Sir De Lacy Evans. The prohibitions and penalties of the act are only against enlistments, fittings-out, equipments, &c., *without the permission or license* of the king, signified by sign-manual, Orders in Council, or proclamation. The nature of this treaty and the obligations under it, as well as the effect of a suspension of the Foreign Enlistment Act upon the international relations of Great Britain, are fully treated in the text, §§ 438-439.

The most remarkable instance of active intervention to vindicate British neutrality is that which is commonly known as the Terceira affair, in 1829-1830. Dom Pedro had retained the crown of Brazil, and renounced that of Portugal in favor of his daughter Donna Maria, under

[¹ For until read till.]—G.G.W.

[¹¹ For we cannot interfere read we have no right to interfere.]—G.G.W.

[¹¹¹ For Hansard, xxiv read Hansard, N.S. xxiv.]—G.G.W.

and practice of belligerent nations, from the earliest times, have subjected enemy's goods in neutral vessels to capture and condemna-

whom a constitutional government was established in that country. Her uncle, Dom Miguel, attempted the overthrow of her government by civil war, in which he was at first successful. The government of Donna Maria and of Dom Pedro called upon Great Britain to lend its aid, under the existing treaties, to secure the throne. Lord Aberdeen's administration took the ground that the treaty did not contemplate intervention in a purely civil war, or internal contest for the succession to the throne, but only a protection against violence from without; and Great Britain assumed the attitude of neutrality between the parties to the civil war. A great many Portuguese subjects—some of them naval and military men—were in England, and were suspected of a design to fit out an expedition from the Channel ports in aid of Donna Maria. The British Government gave notice to the Brazilian Minister, that such a design could not be carried out in British harbors. And the government took the active measure, entirely beyond any requirements or authority of the Foreign Enlistment Act, of requiring all Portuguese suspected of these designs, to remove to a distance from the coast. The Brazilian Envoy stated that the object was only to send Portuguese or Brazilian subjects, unarmed, in unarmed merchant vessels, to Brazil. Four vessels, not armed or equipped as vessels of war, with about seven hundred officers and men, also unarmed and without munitions of war, sailed from Plymouth, under charge of Count Saldanha.⁽¹⁾ The British Government, suspecting that the vessels were bound to Terceira (one of the Azores, which had remained faithful to Donna Maria), despatched a naval force, under Captain Walpole, with orders to cruise or lie at or near the ports of the Azores, and intercept the vessels, and prevent their landing the men. Captain Walpole, intercepting the vessels off Port Praya, tried to bring them to by blank shots, and, as they proceeded, fired ball, by which one man was killed and another wounded. Count Saldanha⁽¹⁾ demanded an explanation, when Captain Walpole made known his instructions, and said it was his duty to prevent the vessels going to any of the Portuguese islands. Count Saldanha⁽¹⁾ replied that the vessels were unarmed and Portuguese, and were bound to an island under Portuguese authority; and, protesting against the forcible interruption on the high seas, surrendered his vessels and his men as prisoners. Captain [567] Walpole refused to accept the surrender, and told them they were at liberty to go to any part of the world they pleased, except the Western Islands. Count Saldanha⁽¹⁾ refused to give up his purpose of going there, and left himself to the forcible control of Captain Walpole, who accompanied the vessels to within five hundred miles of the British Channel, where he left them and returned to Terceira. The Portuguese vessels put into a French port.

This act of the British Government became matter of earnest debate in Parliament. The ministry defended it on the ground that this was, in fact, a warlike expedition, fitted out under a fraudulent pretence of being bound to Brazil; and that Great Britain was compelled, by its neutral obligations, to prevent the disembarkation of the force, even in the harbors of the Queen of Portugal. The opposition contended that, as these were merchant-vessels unarmed, and the men on board unarmed, and destined to a place in the regular dominions of the Queen of Portugal and under her unresisted government, the use of force to intercept them on the high seas, and prevent their reaching their destination, and to compel them to quit the neighborhood of that place, was a violation of the sovereignty of Portugal, and an assumption of jurisdiction on the high seas not justified by the necessity of the case, nor sanctioned by the general law of nations.

A decided majority, however, of each house of Parliament,—126 to 31 in the Lords, and 191 to 78 in the Commons,—sustained the government. (Hansard, xxiii.⁽¹⁾ 780; xxiv. 126. Annual Register, lxxi. 186. Phillimore's Intern. Law, iii. 229-235.)

The construction of the Foreign Enlistment Act, and the duties of the British Government to the United States, came under a good deal of discussion, political and judicial, during the civil war in the United States in 1861-5. The royal proclamation of recognition of belligerent rights in the rebels, and of neutrality, called the provisions of that act into operation.

In pursuance of the rule established by the proclamation, that the Confederates should be acknowledged as entitled to belligerent rights, the commissions of Jefferson Davis to all vessels, whether as public ships or privateers, were recognized as entitling such vessels and their prizes

[¹ For Saldanha read Saldanha.]—G.G.W.

[¹¹ For Hansard, xxiii read Hansard, N.S. xxiii.]—G.G.W.

tion, [552] as prize of war. This constant and universal usage has only been interrupted by treaty stipulations, forming a temporary conventional law between the parties to such stipulations.(a)²¹⁹

to such rights, in accordance with their commissions. (Case of the *Nashville*, Parliamentary Papers of 1862.)

The Case of the Alexandra. The American Minister called the attention of the government to this vessel, building at Liverpool, and presented evidence tending to show that she was building for the Confederate Government. This resulted in the seizure of the vessel, and proceedings for forfeiture, under the act of 1819. The vessel was claimed by Messrs. Sillem. The information charged separately, in several counts, that certain persons named, and others whose names were unknown to the government, did equip, and in another count did furnish, and in another did fit out, the vessel; and, in other counts, charged attempts and endeavors to do these several acts; and, in other counts, a procuring of these several acts to be done; and, in others, the furnishing, assisting, and being concerned in the doing of these several acts; and all, with the intent and in order that she should be employed in the service of the Confederate States, with intent to cruise against citizens of the United States, &c. The defence, technically called 'the plea,' simply denied that the vessel was forfeit for the supposed causes mentioned in the information. This put in issue the alleged facts, as well as the alleged legal result of the facts, if proved.

At the trial, before Chief Baron Pollock of the Court of Exchequer, the evidence [568] showed that the vessel was not completed; that her proportions and style were not suited for a merchant-vessel, but were suited for a man-of-war; that her bulwarks, &c., were of the strength and height for a war-vessel; and left no reasonable doubt that she was built under direction of, and in pursuance of a contract with agents of, the Confederate Government, and was intended by them as a vessel of war to cruise against the United States. The decision, therefore, depended on the rules of law. The Chief Baron ruled, in the course of the trial, that the words 'equip', &c., in this statute, implied an arming for hostile purposes. As the vessel was not armed, and had not reached the stage of arming, this ruling was fatal to the government's case. In his charge to the jury, he did not repeat this particular ruling, nor withdraw it, in terms; but charged generally that the principal offence of actually equipping, with intent, &c., could not be completed unless the equipping was so completed in British territory that the vessel was capable of hostile operations, and consequently that the attempt to equip must be with the intent that she should be so completed in British territory. If it was not proved that the plan, in which the defendants did their part, was to make her a vessel ready for hostile operations *while in British territory*, the crime was not committed. He ruled, also, that it was not a violation of the law to build, equip, and arm a vessel entirely fitted for war, in pursuance of a contract with a belligerent government with the knowledge that that government intended to use her in the existing war, if the parties who did the acts of fitting and arming did not intend to use her in that way themselves, but only to make and sell her, and leave the belligerent government to do as they pleased with her. He next instructed the jury that it was necessary that there should have been, in the British port, an 'arming' of the vessel, not necessarily at all points, but an 'arming,' to complete the offence, as involved in the 'equipping' &c. of a vessel for cruising; and that, as to the charge of attempting or endeavoring to equip, &c., with the intent, &c., it must have been an intent so to arm and equip the vessel that when she left port she should be fitted for hostile operations; and that the offence would not be complete, although the intent all along had been that she should be used as a cruiser when armed, if the purpose was to put the arms on board and complete her for hostile operations, *at a place beyond British jurisdiction*.

Under these rulings, the verdict was for the defendants. The counsel for the crown asked for a bill of exceptions,—the regular mode of taking up to the Court of Appeals the questions

(a) Consolato del Mare, cap. 273. Wheaton's Hist. Law of Nations, 65, 115-119, 200-206. Albericus Gentilis, Hisp. Advoc. lib. i. cap. 27. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, §§ 6, 26; cap. i, § 5, note 6. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 14. Vattel, Droit des Gens, liv. iii. ch. 7. § 115. Heineccius, de Nav. ob. vect. cap. 2, § 9. Loccenius, de Jure Marit. lib. ii. cap. 4, § 12. Azuni, Diritto Maritimo, Part II. ch. 3, arts. 1, 2.

[²¹⁹ See note 223, *infra*, on Free Ships, Free Goods.]—D.

[553] § 443. The regulations and practice of certain maritime nations, at different periods, have not only considered the *goods* of an

Neutral vessels laden with enemy goods, subject to confiscation by the ordinances of some States.

involved in the rulings of the judge; but the Chief Baron refused to sign the bill presented, and denied that his rulings and instructions were as represented by the counsel for the crown. He admitted having said, in an earlier stage of the trial, that an arming was necessary; but contended that his instructions in themselves qualified that ruling, and left it open to the jury to construe the act as not necessarily requiring an arming. The losing party, by the English practice, has no mode of proving the rulings, against the will of a judge who declines to agree that he ruled as alleged in the bill offered to him; and so the appeal is lost. The counsel for the crown resorted to a motion for a new trial, addressed to the full Court of Exchequer, with an understanding that this would, in the opinion of the Chief Baron, give them the right of appeal to the Exchequer Chamber, and eventually to the House of Lords, although they doubted its operation. On the hearing of the arguments for a new trial, one of the judges (Baron Bramwell) sustained the rulings of the Chief Baron, and two of the barons (Channell and Pigot) dissented from them. [569] As the Chief Baron sat on this hearing and sustained his own ruling, there was an equally divided court. It seems that there is a practice, in such cases, for the junior judge to withdraw his judgment; and, as this happened to be Baron Pigot, the new trial was refused. The counsel then appealed to the Court of Exchequer Chamber, composed of the judges of the Queen's Bench and Common Pleas. Here the counsel for the crown were met with the technical objection, which they had apprehended from the first, that no appeal lay from a refusal of a motion for a new trial in causes of this description. This objection was sustained by the majority of the court: Chief Justice Cockburn and Justices Crompton, Blackburn, and Mellor against Chief Justice Erle and Justices Williams and Willes. An appeal was then taken to the House of Lords, where the right of appeal was denied by a vote of four to two; the Lord Chancellor (Westbury) and Lords St. Leonards, Chelmsford, and Kingsdown against Lords Cranworth and Wensleydale.

The case of the *Alexandra*, therefore, settled no law. It only settled, that, for the purposes of that case, the law was inaccessible. The refusal of the Chief Baron to sign the bill of exceptions of itself cut off the crown from that mode of appeal. On the motion for a new trial, in the full Court of Exchequer, as two judges dissented from and one sustained the rulings of the Chief Baron, it strangely operated as a sustaining of the rulings and refusal of a new trial, from the accident that Baron Pigot was junior to Baron Bramwell. Had Baron Pigot been the senior, or had their opinions been reversed, there would have been a new trial. After a failure on the motion for a new trial, there was no power in the realm to get the case before either of the two Courts of Appeal expressly provided for deciding questions of law from the lower courts. The learning, zeal, and general ability shown by the counsel on each side were honorable to the profession. The mortification felt by the English bar, and by all interested in the judicial system of England, was so generally expressed as to have so far passed into history that it may, without impropriety, be referred to in a treatise on international law.

The opinions expressed by the judges of the Exchequer as to the construction of the statute still require attention. The Chief Baron was of opinion, that the statute was intended only to prohibit the complete equipment of a war-vessel within British territory, so that, on sailing from it, she should be in condition to enter upon lawful hostilities, with a commission as well as arms, ammunition, and crew, without any further preparation to be made after it passed beyond British territory; and that, on the charge of so *attempting to prepare* a vessel, it must appear that the acts done were part of a plan of such complete equipment, to be effected within British territory, and done with that purpose and intent. And he further held, that, where the completion of the vessel is arrested, the acts done must of themselves, and in their own nature, constitute part of an arming or purely warlike equipment.

Baron Bramwell was of opinion that the equipment must be 'itself such that, by means of it, the vessel can commit hostilities; and that no equipment which gives no means of attack or defence is within the act.'¹ He admitted the consequence was that a vessel could be built or fitted out at Liverpool for a belligerent, as a vessel of war, to be used as such, and sail from that port, ready for hostilities in all respects but her armament; and that the armament could be sent by the same parties, by another vessel, at the same time, and put on board beyond the marine league: and 'thus the spirit of international law may be violated, and the

[¹ For the act read Section 7.]—G.G.W.

enemy, laden in the ships of a friend, liable to capture, but have doomed to confiscation the neutral *vessel* on board of which these goods

letter and spirit of the [570] municipal act be⁽¹⁾ evaded.' As to the attempt to equip, he said, 'There is no doubt the vessel was building and equipping for the Confederates, and in order that they might use her, when armed and equipped, for hostilities against the Federals. But I see no evidence that it was intended to arm and equip her in the Queen's dominions, so as to be capable of attack or defence.'

Baron Channell said he thought it clear that 'there must be an equipment for war; and that an equipment which cannot be used, and is not useful, for war, will not do.' But in case the equipments, as far as made, do not by their own nature show whether they are for war or not, he held that their purpose and intent could be shown by other evidence, and, among other proofs, by the intent or plan of the parties concerned. In other words, he held, that, if the equipments actually made were of such a nature that they could be used in war, but yet not such as to be purely warlike, and constituting, in their own nature, pure warlike equipments, the jury might solve the question by taking into consideration the intent and purpose with which they were made. Thinking that the charge of the Chief Baron had a tendency to mislead the jury on these points of law, where they were bound by the law laid down, he was of opinion that there should be a new trial.

Baron Pigot held that there must be an intent of the equipper having directly for its object the employment of the vessel by a foreign State in hostilities, and, with such intent, 'a contributory equipment of some kind necessary to such employment;' and that it was evident that such intent need not be derived solely from the nature of the equipment, but may be proved *aliunde*. He thought the charge likely to have misled the jury on this point, and that there should be a new trial.

So far as the opinions of the four judges of the Exchequer are an indication of the legal construction of the statute to be adopted in England, there is not only no danger, but scarcely any inconvenience, in a belligerent fitting out a vessel of war in a British port, and sailing directly thence to begin a hostile cruise, provided some part of the equipment, necessary to enable her to begin hostile operations at once, is kept separate from her until she is beyond the marine league; although that part may be contracted for, provided, and sent out at the same time, and put on board beyond the marine league; or, in the words of Baron Bramwell, 'the spirit of international law violated, and the spirit and letter of the statute evaded.'

Mr. Seward wrote to Mr. Adams, that, if the rulings of the Chief Baron should be affirmed in the highest court of appeals, and become the rule of conduct for the government, 'the President will, as he thinks, be left to understand that there is no law in Great Britain which will be effective to preserve mutual relations of forbearance between the subjects of Her Majesty and the government and people of the United States, in the only point where they are exposed to infraction;' and suggested, for the consideration of Her Majesty's Government, whether 'Parliament will⁽¹¹⁾ not think it just and expedient to amend the existing statute in such a way as to effect what the two governments actually believe it ought now to accomplish. In case of such an appeal, the President would not hesitate to apply to Congress for an equivalent amendment of the laws of the United States, if Her Majesty's Government should desire such a proceeding, although here such an amendment is not deemed necessary.' He adds, that, if the statute should be construed and acted upon in accordance with the rulings of the Chief Baron, and not amended by Parliament, 'there will be left to the United States no alternative but to protect themselves and their commerce [571] against armed cruisers proceeding from British ports, as against the naval forces of a public enemy; and also to claim and insist upon indemnities for all the injuries which all such expeditions have heretofore⁽¹²⁾ committed, or shall hereafter commit, against this government and the citizens of the United States.' To this end, he adds, that the United States, if the navy is not sufficient, will resort to the use of privateers. (Mr. Seward to Mr. Adams, July 16,⁽¹³⁾ 1863: Dipl. Corr. 1863, p. 308.) Mr. Adams accordingly proposed to Earl Russell that the statute should be made more efficacious. At the same time, a memorial from ship-owners of Liverpool had suggested the inadequacy of the statute. Earl Russell expressed his willingness to propose amendments, on the condition that the same should be adopted in the American act. To this the American Government

[¹ *Omit* be.]-G.G.W.

[¹¹ *For* heretofore *read* hitherto.]-G.G.W.

[¹² *For* will *read* might.]-G.G.W.

[¹³ *For* 16 *read* 11.]-G.G.W.

were laden. This practice has been sought to be justified, upon a [554] supposed analogy with that provision of the Roman law, which

assented; but, when Mr. Adams communicated their assent, Earl Russell said Her Majesty's Government had reconsidered the matter, and declined to propose amendments. (Mr. Adams to Earl Russell, May 20, 1865.) To the close of the war, no amendment to the act was proposed to Parliament.

During the last three years of the war, Captain Bulloch, of the Confederate navy, an energetic and capable man, had his headquarters at Liverpool as agent of that government for purchasing, building, and fitting out vessels of war from that port, where his person and office were alike perfectly well known. They had also there disbursing-officers; and Messrs. Frazer, Trenholm, & Co. (a Charleston house, with a branch in Liverpool), and other firms, were notoriously their financial agents. Their practice was to fit out ships completely ready for hostile operations in all respects, except the armament, ammunition, and full crew, and, sailing from Liverpool or Glasgow, to take in the armament and men, &c., either at some small port on the English or French coast, or at the West Indies; the same having been collected and enlisted at Liverpool, and sent thence at the same time in another vessel. These acts were watched and reported to Mr. Adams by the vigilance of the American Consul at Liverpool, Mr. Dudley, and by him laid before Earl Russell. (See, especially, letter of Feb. 9, 1863.) The vessels so equipped and armed mostly made no attempts to visit a Confederate port, and went at once upon their hostile cruises. In this way, several got to sea, among the most conspicuous of which were the *Alabama*, *Shenandoah*, *Florida*, and *Georgia*. Between their cruises, these vessels put into British ports in various parts of the world, where they received hospitalities, obtained supplies of coal and stores, and made repairs. Most of them never visited a Confederate port. The commissions of their commanders and officers were generally issued by the agent of the Confederacy in England, who was empowered thereto. The *Oreto* or *Florida* was complained of by Mr. Adams, Feb. 19, 1862, as fitting out at Liverpool for the rebel service. She sailed, without armament, March 22; was arrested and tried at Nassau, and acquitted on the ground that she had done no illegal act in the Bahamas. She went to Mobile, and took on board her armament, and thence proceeded on her cruise, having run the blockade in front of Mobile. Her career ended by her seizure in the harbor of Bahia, in October, 1864, by the United States ship *Wachusett*. The *Alabama* was complained of June 23, 1862; sailed from Liverpool, July 29, unarmed; came to anchor in a small harbor near Holyhead, and there received a part of her crew, enlisted at Liverpool for the hostile cruise, and taken to her in a tug-boat from that port; thence went to the Azores, took in her armament from two vessels which brought it to her from Liverpool, and proceeded upon her cruise. She destroyed [572] a great many American merchant-vessels, cruised off the Cape of Good Hope, and received hospitalities and supplies at British ports. She was destroyed by the United States ship *Kearsarge*, in the British Channel, June 19, 1864. Four British Naval-Reserve men, who had shipped in her, had their names struck off the list, by order of Feb. 27, 1863. The *Georgia* or *Japan* sailed from Greenock 2d April, 1863, and, in a small French port in the Channel, received her armament, officers, and war-crew, who came to her from Liverpool in a small steamer, the *Alar*, with one of the firm of Jones & Co., of Liverpool, rebel agents. The complaint against the vessel did not reach the Foreign Office until she had sailed. Although a complaint was made against the *Alar*, she was not prosecuted: the law-officers of the crown advising that she had committed no offence. Jones & Highat were tried for enlisting men at Liverpool for the rebel service, convicted, and fined fifty pounds each. The *Georgia* destroyed many vessels; received asylum and supplies in British ports; disarmed herself, and returned to Liverpool, where she was said to have been sold by her owners to Mr. Bates, who fitted her out for sea as a mail and merchant vessel. She was arrested by the United States ship *Niagara*, and sent to Boston as a prize, where proceedings against her are now (1866) pending. Mr. Adams protested against her being allowed to be sold in Liverpool and sent again to sea, without proceedings against her for detention or trial. A man named Campbell was arrested on the charge of fitting her out, pleaded guilty, but was discharged on his recognizance. The history of the *Alexandra* has been given above. The *Rappahannock*: This was a British naval vessel, the *Victor*, sold to Messrs. Coleman in October, 1863. She sailed from Sheerness, with riggers and others on board, in an incomplete state, and went to a French port, where she was not able to arm herself or get to sea during the war. Rumball, the chief of the royal outfitting

involved the vehicle of prohibited commodities in the confiscation pronounced against the prohibited goods themselves.(a)

department at Sheerness Dockyard, was tried and acquitted. No others were prosecuted for this offence. Three men (Seymour, Cunningham, and Buchanan) were tried for being engaged in fitting her out, and, pleading guilty, were discharged on their recognizances, without punishment. The *Shenandoah* or *Sea King*: This vessel, an English trading-steamer, sailed from London Oct. 8, 1864, proceeded to Funchal, and there took in her armament and war-crew from the British steamer *Laurel*, Captain Corbett, which was sent out from Liverpool for that purpose, at the same time the *Sea King* left London. The *Laurel* returned to England. No proceedings were had against her. Captain Corbett was tried and acquitted. The *Shenandoah* went to Melbourne, where she got repairs and stores and enlisted more men, and went to sea, burning a great number of American whalers in the Arctic seas, some of which she destroyed after being informed of the end of the Confederacy and war. She returned to Liverpool, where her commander, Waddell, made a report to Earl Russell, and gave up the vessel to the British Government, who handed her over to the American Consul at Liverpool, the Confederacy having come to an end. The *Pampero* or *Canton*: This vessel was building in the Clyde, was complained of by Mr. Adams, seized, and there being no defence, was held by the crown until the end of the war. The United States Government always continued its remonstrance against allowing any armed vessel under the Confederate flag an asylum for herself or her prizes,—to preserve its protest against the recognition of belligerency. But, beyond that, it remonstrated against allowing asylum, necessary supplies and repairs, and departure to sea,—(with the holding-back of United States vessels for twenty-four hours thereafter) to vessels under the Confederate flag, cruising against our commerce, which had been [573] fitted out, in whole or in part, for that purpose, in British ports, and had escaped or been allowed to depart therefrom before arrest.

Early in 1863, the Messrs. Laird at Liverpool were found to be building two ironclad steam rams, professedly for a French house. Mr. Adams addressed Earl Russell on the subject, with affidavits tending to prove that they were building for the rebel government, and under direction of its agents. At first, Earl Russell replied that the government were advised there was no cause for interference. In his letter of July 11, 1863, Mr. Adams says that the building and sending-out such vessels as rams—instruments of war in themselves, though without guns, and destined of course for purely warlike objects—‘will be regarded by the government and people of the United States as tantamount to a participation in the war by the people of Great Britain, to a degree which, if not seasonably prevented, cannot fail to endanger the peace and welfare of both countries.’ On the 14th August, 1863, he furnished more evidence, and said, ‘It is difficult for me to give your lordship an adequate idea of the uneasiness and anxiety created in the different ports of the United States by the thought that instruments of injury of so formidable a character continue to threaten their safety, as issuing from the ports of Great Britain.’ Earl Russell’s reply, of Sept. 1, showed that the government was not disposed to make a seizure, on the evidence. Sept. 3, 1863, Mr. Adams writes again to Earl Russell his conviction that the rams are intended for the rebel service, and are nearly ready for sea. He adds, ‘I feel it my painful duty to make known to your lordship, that, in some respects, it [the previous letter] has fallen short in expressing the earnestness with which I have been, in the interval, directed to describe the grave nature of the situation in which both countries must be placed in the event of an act of aggression committed against the government and people of the United States by either of these formidable vessels.’ On the 4th September, Mr. Adams communicated more proofs of the destination of the rams, and their apparent immediate departure, and adds, ‘I beg your lordship’s permission to record, in the name of my government, this last solemn protest against the commission of such an act of hostility against a friendly nation.’ The same day, Earl Russell replies, that Mr. Adams’s letter of the 3d inst. ‘is under the serious and anxious consideration of Her Majesty’s Government.’ On the 5th September, Mr. Adams wrote again, that one of the iron-clads is ‘on the point of departure from this kingdom on its hostile errand against the United States.’ He adds, after describing the essentially warlike character and great power of these rams, ‘It would be superfluous in me to point out to your lordship that *this is war*.’ He declined to

(a) Barbeyrac, note to Grotius, lib. iii. cap. 6, § 6, note 1.

[555] Thus, by the marine ordinance of Louis XIV., of 1681, all vessels laden with enemy's goods are declared lawful prize of war. The

repeat his arguments, and, with this letter, closed the subject. It was left to be understood that the sailing of the rams would be—not a probable cause of war, but war itself. In the course of the day, he received a letter from Earl Russell, announcing that the government had issued orders to prevent their departure.

The rams were seized, and, after the institution of legal proceedings, the government bought them of the Messrs. Laird for the navy, and so closed the question with the United States. The opposition, under Earl Derby and Lord Chelmsford in the Lords, and Sir Hugh Cairns and Mr. Walpole and Mr. Seymour Fitzgerald in [574] the Commons, attacked the government for having made the seizure in violation of law, and without sufficient proofs. The course of the government was defended by Earl Russell and the Duke of Argyll in the Lords, and the Attorney-General, Sir R. Palmer, in the Commons. In these debates, the government distinctly admitted their obligation to give to the United States their rights under the law of nations, whether Acts of Parliament furnished the means or not; and justified the arrest on the ground of the absolute necessity of stopping the departure of vessels of such a character, under circumstances of reasonable suspicion. Subsequent events showed that the rams were built and destined for immediate rebel service, and that the statements made to the government by the builders were fraudulent. (London Times of 11th February and 13th April, and Annual Register, 1864, pp. 125–129.) Before hearing of the result, Mr. Seward had written to Mr. Adams (Sept. 5, 1863, Dipl. Corr. 1863, p. 369),⁽¹⁾ that, if the rams sailed, and attacked our blockade or ports, it would 'make a retaliatory war inevitable.'

At the close of the civil war, Mr. Adams, in a correspondence with Earl Russell, beginning April 7, 1865, and closing with a letter of Nov. 3, 1865, reviews the alleged failures of Great Britain to fulfil her obligations as a neutral, and demands compensation for the injuries resulting thereby to the United States.

In his letter of April 7, Mr. Adams argues that formidable vessels of war have gone from British ports, and entered at once on their hostile career, without ever visiting a port of the Confederacy,—the crews and armament being British, as well as the vessels and their stores; that these have been procured by rebel agencies openly employed in Liverpool; that these acts have been in violation of our rights, and been caused by the fact that Great Britain accorded belligerent rights to the rebels in an 'unprecedented and precipitate manner;' and that, under the circumstances, this amounted to a creation of the maritime belligerent powers of the rebels out of British materials, the result of which had been the gradual transfer of commerce from American to British flags and vessels.

Earl Russell, May 4, 1865, defends the course of Great Britain in recognizing belligerency, and denies any liability for any actual or supposed consequences thereof. As to the building and equipping of vessels, he enters into particulars as to the Alabama, Shenandoah, and Florida, for the purpose of showing that the government honestly and in good faith did its duty in endeavoring to prevent such violations of law; and takes the ground that, if the government does that, it is not answerable for the consequences if a vessel is fitted out and sails from Great Britain, in violation of her laws, and commits hostilities beyond her jurisdiction. He cited the course taken by the United States on the complaints of Spain and Portugal, during the civil wars in South America, as precedents to the point that a nation is not expected to make compensation where it considers itself to have executed its laws with fidelity, although breaches of neutrality have been committed, and caused serious loss to another nation. (See this note, *ante*, p. 467.)

Mr. Adams, on the 20th May, replies, reviewing the subject. He insists that the original cause was the improper according of belligerent rights to the rebels, the direct consequence of which, he insists, was the creation in England of all the maritime power they had; and that, if the government could not repress violations of law arising from this recognition, they were responsible by reason of having furnished the opportunity and occasion. He enters into details as to the equipping and sailing of vessels [575] to show, that, especially in the case of the Alabama, the departure was owing to the unconcealed sympathy, connivance, and neglect of officials between the Minister and the vessel herself. He urges, that, after experience had shown the inefficiency of the statutes as expounded, the United States had suggested amendments, and

[1 For 369 read 365.]—G.G.W.

contrary rule had been adopted by the preceding prize ordinances of France, and was again revived by the règlement of 1744, by

offered co-operation in making them; but that the British Government had deliberately refused to propose changes to Parliament, after once agreeing to do so, and thereby became responsible for the inadequacy of the statutes. He states the rule as unquestionable, that a want of statute provisions is never a justification to a nation, and cannot be even an excuse or apology, after the want is known and opportunity is open for supplying it. He refers to the fact that the British statutes want those very preventive provisions which the United States added to the act in 1817, at the suggestion of the Portuguese Minister, under circumstances somewhat like. As to the relations of the United States with Spain and Portugal, beside the immediate compliance with the request of Portugal to amend the laws, citizens of the South American States in revolt were prosecuted by the United States for violations of her neutrality laws; while citizens of the United States in insurrection were openly residing in England, and engaged as agents of the Confederate Government in fitting out vessels, notoriously in violation of her laws, yet not one had been prosecuted, although requests to that effect had been made and evidence furnished. The United States did make compensation to Spain for the Miranda expedition, and other demands, by accepting them as fair equivalents for their own demands against Spain, in the treaty of 1819. He complains, that, after the Alabama had, as Lord Russell says, escaped from Great Britain,—having, as the government now admit by ordering her arrest, though too late, violated their laws of neutrality,—she had since visited British ports in all parts of the world, and been received with honor and hospitality; and cites a passage from Hautefeuille, to the effect that, under such circumstances, the offended nation can detain and disarm a vessel of war, or, if out of her control, demand her disarmament, and the restitution of her prizes.

Aug. 30, 1865, *Earl Russell to Mr. Adams*: His lordship re-argues the recognition of belligerency,—contending that the case was *sui generis*, and that the facts existing and known, as well as the probabilities of the future, demanded the recognition by Great Britain at once, in justice to the United States and herself as well as to the Confederates; that, by recognizing belligerency in both parties, it admitted the right of the United States to blockade all her own ports against British commerce, and to stop and search all British vessels at sea. He re-examines the facts as to the escape of vessels fitted out unlawfully, and contends that the British Government did its duty in good faith. As to the Act of Parliament, he says the determination of the government was not to alter the law, unless, after sufficient trial, it should be proved to be practically inadequate; and contends that the existing law had not been so proved, and that it was not certain that possible alterations would enable more to be done in the way of prevention. He reviews the relations of Portugal with the United States for the purpose of defending his position, that a nation must judge for itself whether it has done its duty honestly, and is not liable for captures made beyond its jurisdiction by vessels which have, within its jurisdiction, been fitted out in violation of its laws. He refuses to submit the matter to arbitration, on the ground that the decision of the umpire must depend upon the answer to two questions, neither of which Great Britain could put to arbitration with due regard to her own dignity and character,—[576] *first*, whether the government has acted with good faith and due diligence in executing its laws; and, *second*, whether the law-officers of the crown properly understood the British statutes, when they had advised against legal proceedings.

Feb. 18, 1865, *Mr. Adams to Earl Russell*: After re-arguing the question of the recognition of belligerency, and the cases of Spain and Portugal, Mr. Adams says that the complaint of the United States (beyond the original and main one of hasty recognition of belligerency) is, that the measures for prevention were, in fact, feeble and tardy; and the statutes, as construed and acted upon, were not adequate to meet the just demands of the United States; and proposals to amend them were refused, although they were defective in the very points in which they omitted the preventive provisions of the American acts. It is not enough, he says, for a government even to execute its statutes in good faith, if they are insufficient.

Oct. 17, 1865: Mr. Adams says, that, in view of the reasons assigned by the British Government for refusing an arbitration, no proposal of that kind for the settlement of existing differences will henceforward be insisted upon or submitted by the United States.

Nov. 3, 1865: Earl Russell goes once more over the ground previously examined, as to the course of the United States in dealing with Spain and Portugal, and the course of Great Britain

which it was declared, that 'in case there should be found on board of neutral vessels, of whatever nation, goods or effects belong[557]ing to

during this war. As to the foreign enlistment acts, he admits that the British act has 'not proved, upon trial, to be completely efficacious;' but contends that the American act, with its additional clauses, proved not more so; and proposes that the two governments should now agree upon some amendments to be made to the neutrality acts.

Having declared that Great Britain would not submit to arbitration any subject which involved the question whether the Government, by any of its officials, had failed to act with due diligence, or had rightly construed its own statutes, he proposed a commission to settle any claims, not involving those points, which the two governments might agree to submit to it. (This correspondence is in Supplements to the London Gazette, of Oct. 11 and Nov. 11, 1865.)

Mr. Adams to Earl Russell, Oct. 21, 1865, takes up the case of the *Shenandoah*, and holds the British Government responsible for the captures made by this vessel, on the ground of the manner of her outfit, and the course of the British Government towards her since her career began. He says, that, when the *Kearsarge* destroyed the *Alabama*, her crew surrendered as prisoners of war to the *Kearsarge*, but were taken away and landed in England by a private English vessel, the *Deerhound*; and that he then (6th September, 1864) represented that many of these men were British subjects, some being on the Naval-Reserve list, and were still under pay and engagement to join some other vessel fitting out in England to take the place of the *Alabama* (10th November, 1864); that Earl Russell limited his reply to maintaining a right of asylum in Great Britain to foreign belligerents not violating British laws, and no measures were taken to prevent their new enterprise being entered upon; that the steamer *Sea King*, fitted for war in all respects except armament and ammunition, sailed from London Oct. 8, and her consort, the *Laurel*, from Liverpool the next day,—having on board many of these men from the *Alabama*, and the armament and munitions of the *Sea King* in her hold: and the two vessels met at Madeira, where the *Sea King*, calling herself the *Shenandoah*, completed her outfit for war, and began her cruise. She never visited, or attempted to visit, a Confederate port, and earned no national [577] characteristic which she did not take with her from British soil. The British Government did not denounce the transaction, and deny asylum or countenance to the vessel; but accepted the result as legitimate, and directed that the *Shenandoah* should have, in all British ports, the privileges of a regularly commissioned public ship of war of a belligerent; and, under that rule, she received supplies in British dependencies, which enabled her to keep the seas and destroy American commerce, even after the nationality whose flag she purported to carry had ceased to exist.

Mr. Adams then restates the case as to the rebel agency in Liverpool, and says that the Naval Bureau of the rebel States was, in fact, at Liverpool, and not at Richmond; that Captain Bulloch, the head of that bureau, and the other well-known naval and financial agents, there built or bought vessels, enlisted men, obtained armaments and supplies of every kind for them, projected their cruises, regularly paid the officers and men, gave out their commissions, and directed their movements. Of all this, he had furnished conclusive evidence to the British Government; yet no effort was made, even the slightest, to prevent these acts or punish these persons. At the same time, a few Englishmen were prosecuted for acts done in a subordinate character under these men, which resulted either in acquittals, or discharges on recognizance, or small fines. The British Government admitted the authority of Captain Bulloch to act for his government by using him as a medium for transmitting orders to the *Shenandoah* to stop her cruise, after the rebel government had ceased to exist. These facts leave no doubt, *now*, that the seat of the rebel naval administration was at Liverpool, and that Captain Bulloch was its chief.

Nov. 7, 1865, Mr. Adams to the Earl of Clarendon: Refers to the arrival of the *Shenandoah* in Liverpool, and demands that she be given up to his government, that it may be secure against a renewal of her depredations. He suggests that the ravages by this vessel seem to have been continued after her commander knew his government had ceased to exist; and that the British Government should take such measures, at its discretion, as that statement rendered proper.

Nov. 11, 1865, Earl of Clarendon to Mr. Adams: Informs Mr. Adams that the *Shenandoah* has been surrendered to the British Government, and by that government is delivered up to the United States Consul at Liverpool. He says there is not sufficient legal evidence in possession

His Majesty's enemies, the goods or effects shall be good prize, and the vessel shall be restored.' Valin, in his commentary upon the ordinance,

of the government to prove that Captain Waddell continued hostilities under such circumstances as to constitute piracy *jure gentium*, and to warrant the detention of any of her crew who are foreigners; and that, upon a muster of her crew, the officer was not satisfied that any on board were known as British subjects. They were all, therefore, discharged.

Nov. 14, 1865, *Mr. Adams to Earl of Clarendon*: Mr. Adams replies, that, in his opinion, the evidence he had sent to the Foreign Office was such as to make the release of these men a cause of just disappointment to the United States.

Nov. 17, 1865, *Earl of Clarendon to Mr. Adams*: Says that the papers sent by Mr. Adams, if they contained sufficient proofs, which he denies, could not be received by any magistrate as competent, but that the personal presence of witnesses would be necessary.

Nov. 18, 1865, Lord Clarendon replies at length to Mr. Adams's letter of 21st October to his predecessor, Earl Russell. As to the crew of the *Alabama*, they were entitled to asylum in England, whatever they may have done beyond British jurisdiction which was not a violation of British law or the law of nations; and, as to [578] the former, that no evidence was furnished the British Government that any of them were British subjects who had unlawfully enlisted in the Confederate service, or foreigners who violated British law, or were subject to extradition; and that the government could not detain them, or refuse them asylum, on the suspicion or probability, however great, that they might afterwards violate the neutrality laws of England. As to the sailing of the *Shenandoah* from England, she sailed long before any intimation had been given to the government of any suspicions against her. (She sailed Oct. 8, and Mr. Adams's letter was Nov. 10.) Moreover, the British laws do not prohibit the sailing of unarmed merchant-vessels, as the *Shenandoah* was when she sailed, nor the departure of British subjects from England, as individuals, to join either belligerent service; and the British Government is not responsible for the fact that such persons join such a vessel in a foreign port, and that she gets her armament there, even if from another British merchant-vessel by which it is taken out as contraband merchandise, and there begins her cruise.

As to the asylum and supplies afforded to the *Shenandoah* in British ports, they were the necessary consequences of the recognition of the belligerency of the Confederates. Their vessels must receive the privileges of all public ships of war. If the *Shenandoah* used these supplies, obtained while her government existed, in hostilities after it expired, the British Government could not be responsible.

Lord Clarendon refers to the American precedents during the South American wars, and says, that, although the vessels cruising under the patriot flags against Spanish and Portuguese commerce were proved often, by legal testimony in court, to have been armed and equipped in ports of the United States, yet the United States did not exclude them from the privileges of its ports.

As to the Confederate agency in England, his lordship replied that each belligerent could and did have agencies there to procure all materials contraband of war; and, if the Confederate agents went beyond that privilege, they did it secretly, and with artifices sufficient to prevent seasonable discovery.

Mr. Adams to Lord Clarendon, Nov. 18, 1865 (in reply to Lord Russell's, of Nov. 2, 1865), disclaims the position that a neutral is liable for the consequences of a violation of its neutrality by a belligerent, without regard to the circumstances attending each case; and repeats the argument, that Great Britain's liability arises from the circumstances attending the individual cases, beyond and irrespective of the general objection to its recognition of belligerency. His proposition is, that the neutral is responsible when it fails to exercise the means in its power. He re-examines the Portuguese question, and states its history for the purpose of showing—(1) That the United States instantly added to its statutes new clauses, at the suggestion of Portugal, and to the entire satisfaction of that power; (2) That it took the responsibility of suppressing by force a base of hostile operations against Portuguese commerce beyond the jurisdiction of the United States; (3) That it did prosecute both South Americans and citizens of the United States in considerable numbers, and whenever sufficient evidence was known, and did restore, in great numbers, prizes made by vessels illegally fitted out; and (4) That these measures were effective, so that but few causes of complaint arose after 1820. As to amendments to the British acts, Mr. Adams says that his proposal was not to adopt the

admits that the more rigid rule, which con[558]tinued to prevail in the French prize tribunals from 1681 to 1744, was peculiar to the

American amendments of 1818, or any other particular amendment, but only that proper amendments be made, in such way as the British Government should itself suggest; and that Lord Russell's refusal [579] was not a refusal of any particular amendment, but a refusal to do any thing whatever on the subject. To such a refusal, it was no defence to say, if it could be shown to be true, that the American clauses of 1818 were not effective, or to make the general declaration that the government is 'not bound to go on making new laws *ad infinitum* because new occasions arise.' During this very war, Great Britain had suggested to the Canadian Parliament to make new laws to preserve its neutrality. It is the arising of occasions that shows the need of new laws, and furnishes one of the reasons for permanent legislatures. He contrasts the rapidity and vigor with which the United States acted on the complaint of Sir John Crampton, in 1855, with the action of England in the cases drawn to its attention during this war. In answer to the suggestion of Lord Russell's last letter, that now, after the close of the war, both countries should unite on some amendment of their neutrality law, Mr. Adams accepts the proposal as an admission that the British act needs amendment; and, denying that the American does need amendment, replies that his lordship could hardly expect that the American people, after suffering greatly from the refusal to amend the British acts during the existence of the war, or to make reparation for the consequences of their now-admitted inefficiency, would be satisfied by a proposal to make new laws, mutually, which should give Great Britain hereafter a protection she had refused to furnish to us in our need.

Mr. Adams to Earl of Clarendon, Nov. 21, 1865, gives the refusal of the United States Government to agree upon a commission to settle particular claims between the two governments arising out of the war, so long as Great Britain, for the reason she assigns, refuses to submit the great claims the United States is now urging.

Lord Clarendon to Mr. Adams, Dec. 2, 1865, declines to continue the correspondence, as he considers the subject to be exhausted by the letters on the two sides, and fears its continuance might introduce acrimony into the relations between the countries, whose mutual friendship it is so important to preserve.

The summary of this memorable correspondence may be stated thus: The United States claims reparation from Great Britain for injuries done to her commerce by cruisers under the rebel flag, for the following reasons: (1) Because Great Britain made a precipitate and unwarranted recognition of belligerency of the rebel power, and thereby established in law, and to some extent brought about in fact, a state of things which made possible and probable the illegal acts of individuals complained of. (2) Because the measures taken by the British Government to prevent the sailing of vessels from British ports, fitted and equipped therein in violation of her neutrality, were tardy and feeble, as well as ineffectual; whether this arose from mistakes of law in the advisers of the crown, or bad faith or incapacity in inferior officials, or from the insufficiency of the Acts of Parliament, being purely an internal question, with which the United States were not bound to deal. (3) Because Great Britain did not seize and detain or disarm these vessels, or refuse them asylum, or otherwise deal with them in such manner as the law of nations authorized her to do, after their fraudulent escape from their original ports. (4) Because the British Government refused even to suggest amendments of her Acts of Parliament in any respect whatever, or to introduce the subject to Parliament, when their inefficiency had been proved, and the government had been requested so to do, not only by the United States, on terms of reciprocity, but by British citizens interested in preserving neutrality. (5) Because the government had neglected or refused to prosecute citizens of the so-called Confederate States who were openly residing in England as agents for that power, and [580] notoriously engaged in fitting out vessels in violation of British neutrality, though abundant evidence had been furnished to authorize proceedings. (6) Because, by reason of this course of the British Government, the rebels had been able to set forth and maintain an effective force of steamers cruising against American commerce, having asylum and making repairs and getting coal and supplies in British ports, built, fitted out, armed, and manned in and from England, and never even expecting or pretending to visit a port of the Confederacy, when otherwise they would scarcely have had a single cruiser; the result of which had been a most effective belligerent aid to the rebellion, and the great advantage to England and detriment to the United States of driving from the seas the greater part of the American mercantile

jurisprudence of France and Spain; but that the usage of other nations was only to confiscate the goods of the enemy.(b)

Goods of
a friend on
board the
ships of an
enemy, liable
to confiscation
by the
prize codes
of some
nations.

[559] § 444. Although by the general usage of nations, independently of treaty stipulations, the goods of an enemy, found on board the ships of a friend, are liable to capture and condemnation, yet the converse rule, which subjects to confiscation the goods of a friend, on board the vessels of an enemy, is manifestly contrary to reason and justice. It may, indeed, afford, as Grotius has stated, a presumption [560] that the goods are enemy's property; but it is such a presumption as will readily yield to contrary proof, and not of that class of presumptions which the civilians call *presumptiones juris et de jure*, and which are conclusive upon the party.

But however unreasonable and unjust this maxim may be, it has

marine, heretofore the equal and rival of Great Britain, and transferring the commerce of the world to the British flag.

The British Government replies: (1) That the recognition of belligerency was justifiable and made necessary at the time it was done, and dictated by a duty to the United States as well as to Great Britain; and that the United States gained by it the rights of blockade and search. (2) That the government acted in good faith and with reasonable diligence in enforcing its laws for the preservation of its neutrality; and that, if subordinate officials failed in capacity or diligence in particular cases, their acts or failures being but a part of the entire proceedings otherwise proper and effective, the nation cannot be expected to hold itself responsible for their remote consequences, in the way of making compensation for acts done by belligerents out of its jurisdiction. (3) That the government did seize and prosecute, in her colonial ports, vessels which were charged with being fitted out at home in violation of neutrality; and that she was not bound by the law of nations to refuse asylum to, or seize or disarm, or insist on the disarmament of, vessels afterwards commissioned as public ships of war of a belligerent visiting her ports, on the ground that they had been originally, and before their commissioning as vessels of war, fitted out in her jurisdiction in violation of her neutrality. (4) That the government was not satisfied that the Acts of Parliament had proved inadequate to such an extent, and after so full trial, or that any amendments would be likely to improve them so materially, as to justify the United States in charging the refusal to attempt their amendment as a want of good faith. (5) That the government had judged in good faith, on the advice of competent counsel, whether, in cases suggested, prosecutions against individuals should be instituted. (6) That, if vessels fitted out and despatched from Great Britain ever so clearly in violation of her neutral rights, had fraudulently escaped, without bad faith on the part of the government, Great Britain was not responsible for acts of hostility done by such vessels beyond her jurisdiction. Her duty was fulfilled if she restored any prizes such vessels might bring within her jurisdiction. (7) That it was inconsistent with the dignity and honor of the government to submit to arbitration claims of another government, the decision of which involved a question whether the advisers of the crown had correctly interpreted the law, or the executive officers of the crown had acted with diligence, good judgment, or good faith.

On the subject of the neutrality or foreign enlistment acts of the United States and Great Britain, and the political and judicial course of the two nations in connection with them, see, in addition to the authorities cited in the course of this note, Kent's Comm. i. 115-124. Phillimore's Intern. Law, iii. 211-219, 227-237. Mr. Gibbs's pamphlet [581] on the Foreign Enlistment Act (London, 1863). Mr. Bemis's pamphlet on American Neutrality (Boston, 1864), and Letters to the Boston Daily Advertiser of August, 1865. Letters of Historicus to the London Times of March 22, April 24, and Oct. 16, 1865. Earl Russell's Speech of March 23, 1865. Mr. Loring's pamphlet on Neutrality (Boston, 1863). Speech of Sir R. Palmer, of May 13, 1864.]—D.

(b) Valin, Comm. liv. iii. tit. 9. Des Prises, art. 7. Wheaton's Hist. Law of Nations, 111-114.

been incorporated into the prize codes of certain nations, and enforced by them at different periods. Thus, by the French ordi[nances] of 1538, 1543, and 1584, the goods of a friend, laden on board the ships of an enemy, are declared good and lawful prize. The contrary was provided by the subsequent declaration of 1650; [562] but by the marine ordinance of Louis XIV., of 1681, the former rule was again established. Valin and Pothier are able to find no better argument in support of this rule, than that those who lade their goods on board an enemy's vessels thereby favor the com[m]erce of the enemy, and by this act are considered in law as submitting themselves to abide the fate of the vessel; and Valin asks, 'How can it be that the goods of friends and allies, found in an enemy's ship, should not be liable to confiscation, whilst even those [564] of subjects are liable to it?' To which Pothier himself furnishes the proper answer: that, in respect to goods, the property of the king's subjects, in lading them on board an enemy's vessels they [565] contravene the law which interdicts to them all commercial intercourse with the enemy, and deserve to lose their goods for this violation of the law.(a)

[566] The fallacy of the argument by which this rule is attempted to be supported, consists in assuming, what requires to be proved, that, by the act of lading his goods on board an enemy's vessel, [567] the neutral submits himself to abide the fate of the vessel; for it cannot be pretended that the goods are subjected to capture and confiscation *ex re*, since their character of neutral property exempts [568] them from this liability. Nor can it be shown that they are thus liable *ex delicto*, unless it be first proved that the act of lading them on board is an offence against the law of nations. It is therefore [569] with reason that Bynkershoek concludes that this rule, where merely established by the prize ordinances of a belligerent power, cannot be defended on sound principles. Where, indeed, it is [570] made by special compact the equivalent for the converse maxim, that *free ships make free goods*, this relaxation of belligerent pretensions may be fairly coupled with a correspondent concession by [571] the neutral, that *enemy ships should make enemy goods*. These two maxims have been, in fact, commonly thus coupled in the various treaties on this subject, with a view to simplify the judicial in[572]quiries into the proprietary interest of the ship and cargo, by resolving them into the mere question of the national character of the ship.

[573] § 445. The two maxims are not, however, inseparable. The primitive law, independently of international compact, rests on the simple principle, that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. The right to capture an enemy's property has no limit but of the *place* where the

The two maxims, of *free ships free goods*, and *enemy ships enemy goods*, not necessarily connected.

(a) Valin, Comm. liv. iii. tit. 9. Des Prises, art. 7. Pothier, Traité de Propriété, No. 96.

[574] goods are found, which, if neutral, will protect them from capture. We have already seen that a neutral vessel on the high seas is not such a place. The exemption of neutral property from capture [575] has no other exceptions than those arising from the carrying of contraband, breach of blockade, and other analogous cases, where the conduct of the neutral gives to the belligerent a right to treat [576] his property as enemy's property. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property. States have [577] changed this simple and natural principle of the law of nations, by mutual compact, in whole or in part, according as they believed it to be for their interest; but the one maxim, that *free ships make* [578] *free goods*, does not necessarily imply the converse proposition, that *enemy ships make enemy goods*. The stipulation, that neutral bottoms shall make neutral goods, is a concession made by the belli[579]gerent to the neutral, and gives to the neutral flag a capacity not given to it by the primitive law of nations. On the other hand, the stipulation subjecting neutral property, found in the vessel of [580] an enemy, to confiscation as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the pre-existing law of nations; but [581] neither reason nor usage renders the two concessions so indissoluble, that the one cannot exist without the other.

It was upon these grounds that the Supreme Court of the United States determined that the treaty of 1795, between them and Spain, which stipulated that free ships should make free goods, did not necessarily imply the converse proposition, that enemy ships should make enemy goods, the treaty being silent as to the latter; and that, consequently, the goods of a Spanish subject, found on board the vessel of an enemy of the United States, were not liable to confiscation as prize of war. And although it was alleged, that the prize law of Spain would subject the property of American citizens to condemnation, when found on board the vessels of her enemy, the court refused to condemn Spanish property, found on board a vessel of their enemy, upon the principle of reciprocity; because the American government had not manifested its will to retaliate upon Spain; and until this will was manifested by some legislative act, the court was bound by the general law of nations constituting a part of the law of the land.^(a)²²⁰

(a) The *Nereide*, Cranch's Rep. ix. 388.

²²⁰ Not only are the two maxims,—free ships free goods, and hostile ships hostile goods,—separable, but they have no logical connection with each other. The rule which condemns enemy's goods in a neutral vessel, releasing the vessel, and condemns an enemy's ship, releasing its neutral cargo, is, as Heffter says (*Europ. Völker*. § 162), an application of the maxim, *summum cuique*. The rule that the cargo found in enemy's ships, not being contraband or engaged in violation of any of the captors' rights of war, is to be examined into on proofs, and to be

§ 446. The conventional law, in respect to the rule now in question, has fluctuated at different periods, according to the fluctuating policy and interests of the [582] different maritime States of Europe. It has been much more flexible than the consuetudinary law; but there is a great preponderance of modern treaties in favor of the maxim, *free ships free goods*, sometimes, but not always, connected with the correlative maxim, *enemy ships enemy goods*; so that it may be said that, for two centuries past, there has been a constant tendency to establish, by compact, the principle, that the neutrality of the ship should exempt the cargo, even if enemy's property, from capture and confiscation as prize of war. The capitulation granted by the Ottoman Porte to Henry IV. of France, in 1604, has commonly been supposed to form the earliest example of a relaxation of the primitive rule of the maritime law of nations, as recognized by the Consolato del Mare, by which the goods of an enemy, found on board the ships of a friend, were liable to capture and confiscation as prize of war. But a more careful examination of this instrument will show, that it was not a reciprocal compact between France and Turkey, intended to establish the more liberal maxim of *free ships free goods*; but was a gratuitous concession, on the part of the Sultan, of a special privilege, by which the goods of French subjects laden on board the vessels of his enemies, and the goods of his enemies laden on board French vessels, were both exempted from capture by Turkish cruisers. The capitulation expressly declares, art. 10⁽¹⁾:—'Parceque des sujets de la France naviguent sur vaisseaux appartenants à nos ennemis, et les chargent de leurs marchandises, et étant rencontrés, ils sont faits le plus souvent esclaves, et leurs marchandises prises; pour cette cause, nous commandons et voulons qu'à l'avenir, ils ne puissent être pris sous ce prétexte, ni leurs facultés confisquées, à moins qu'ils ne soient trouvés sur vaisseaux en course,' etc. Art. 12:—'Que les marchandises qui seront chargées sur vaisseaux Français appartenantes aux ennemis de notre Porte, ne puissent être prises sous couleur qu'elles sont de nos dits ennemis, puisqu'ainsi est nôtre vouloir.'⁽²⁾ (a)⁽³⁾

Conventional law as to free ships free goods.

restored to a neutral who proves his title and right of possession, clear of other causes for condemnation, is now acted upon without question in the prize courts of England and America. So is the rule, in the absence of treaty modifications, that enemy's goods captured at sea are none the less liable to condemnation for being in the custody of a neutral. In the latter case, the question between the captor and the neutral carrier is simply one of the right of possession; and the law of war allows the belligerent to take the possession from the neutral carrier, on such terms, respecting compensation for his vested rights in freight, as national reciprocity shall have established. The capture is a defence to the neutral, if sued by the shipper upon his contract of affreightment. See note 223, *infra*, on Free Ships, Free Goods.]—D.

(a) Flassan, *Histoire de la Diplomatie Française*, tom. ii. p. 226. M. Flassan observes: 'C'est à tort qu'on a donné à ces Capitulations le nom⁽¹¹⁾ de *traité*, lequel suppose deux parties

[¹ For art. 10 read art. 9.]—G.G.W.

[¹¹ The text of these articles is not exactly quoted.]—G.G.W.

[¹¹¹ For Capitulations le nom read Capitulations du 20 Mai 1604 le nom.]—G.G.W.

Treaties by
Holland on
his subject.

[583] § 447. It became, at an early period, an object of interest with Holland, a great commercial and navigating country, whose permanent policy was essentially pacific, to obtain a relaxation of the severe rules which had been previously observed in maritime warfare. The States-General of the United Provinces having complained of the provisions in the French ordinance of Henry II., 1538, a treaty of commerce was concluded between France and the Republic, in 1646,⁽¹⁾ by which the operation of the ordinance, so far as respected the capture and confiscation of neutral vessels for carrying enemy's property, was suspended; but it was found impossible to obtain any relaxation as to the liability to capture of enemy's property in neutral vessels. The Dutch negotiator in Paris, in his correspondence with the grand pensionary De Witt, states that he had obtained the 'repeal of the pretended French law, *que robe d'ennemi confisque celle d'ami*; so that if, for the future, there should be found in a free Dutch vessel effects belonging to the enemies of France, these effects alone will be confiscable, and the ship with the other goods will be restored; for it is impossible to obtain the twenty-fourth article of my Instructions, where it is said that the freedom of the ship ought to free the cargo, even if belonging to an enemy.' This latter concession the United Provinces obtained from Spain by the treaty of 1650; from France by the treaty of alliance of 1662; and by the commercial treaty signed at the same time with the peace at Nimiguen in 1678, confirmed by the treaty of Ryswick in 1697. The same stipulation was continued in the treaty of the Pyrénées between France and Spain, in 1659. The rule of *free ships free goods* was coupled, in these treaties, with its correlative maxim, *enemy ships enemy goods*. The same concession was obtained by Holland from England, in 1668 and 1674, as the price of an alliance between the two countries against the ambitious designs of Louis XIV. These treaties gave rise, in the war which commenced in 1756 between France and Great Britain, to a very remarkable controversy between the British and Dutch governments, in which it was contended, on the one side, that Great [584] Britain had violated the rights of neutral commerce, and on the other, that the States-General had not fulfilled

contractantes stipulant sur leurs intérêts; ici on ne trouve que des concessions de privilèges, et des exemptions de pure libéralité faites par la Porte à la France.' In the first English edition of this work, and also in another work more recently published, under the title of 'History of the Law of Nations,' the author has been misled, by following the authority of Azuni and other compilers, into the erroneous conclusion, that the above capitulation was intended to change the [583] primitive law, as observed among the maritime States of the Mediterranean from the earliest times, and to substitute a more liberal rule for that of the *Consolato del Mare*, of which the Turks must necessarily be supposed to have been ignorant, and which the French king did not stipulate to relax in their favor, when the goods of his enemies should be found on board Turkish vessels.

[¹ The treaty of 1646 refers to Ordinance of Henry III, 1584.]—G.G.W.

the guaranty which constituted the equivalent for the concession made to the neutral flag, in derogation of the pre-existing law of nations. (a)²²¹

§ 448. A treaty of commerce and navigation was concluded between the Republic of England and the King of Portugal in 1654, by which the principle of *free ships free goods*, coupled with the correlative maxim of *enemy ships enemy goods*, was adopted between the contracting parties. This stipulation continued to form the conventional law between the two nations, also closely connected by political alliance, until the revision of this treaty in 1810, when the stipulation in question was omitted, and has never since been renewed.

Treaty by Portugal on this subject

§ 449. The principle that the character of the vessel should determine that of the cargo, was adopted by the treaties of Utrecht of 1713, subsequently confirmed by those of 1721 and 1739, between Great Britain and Spain, by the treaty of Aix-la-Chapelle, in 1748, and of Paris in 1763, between Great Britain, France, and Spain. (a)

The two maxims united, in certain great treaties.

§ 450. Such was the state of the consuetudinary and conventional law prevailing among the principal maritime powers of Europe, when the declaration of independence by the British North American colonies, now constituting the United States, gave rise to a maritime war between France and Great Britain. With a view to conciliate those powers which remained neutral in this war, the cabinet of Versailles issued, on the 26th of July, 1778, an ordinance or instruction to the French cruisers, prohibiting the capture of neutral vessels, even when bound to or from enemy ports, unless laden in whole or in part with contraband articles destined for the enemy's use; reserving the right to revoke this concession, unless the enemy should adopt a reciprocal [585] measure within six months. The British government, far from adopting any such measure, issued in March, 1780, an order in council suspending the special stipulations respecting neutral commerce and navigation contained in the treaty of alliance of 1674, between Great Britain and the United Provinces upon the alleged ground that the States-General had refused to fulfil the reciprocal conditions of the treaty. Immediately after this order in council, the Empress Catharine II. of Russia communicated to the different

Armed neutrality of 1780.

(a) Dumont, Corps Diplomatique, tom. vi. Part I. p. 342. Flassan, Histoire de la Diplomatie Française, tom. iii. p. 451. A pamphlet was published on the occasion of this controversy between the British and Dutch governments, by the elder Lord Liverpool (then Mr. Jenkinson), entitled 'A Discourse on the Conduct of Great Britain in respect to Neutral Nations during the present War,' which contains a very full and instructive discussion of the question of neutral navigation, both as resting on the primitive law of nations and on treaties. London, 8vo, 1757⁽¹⁾; 2d edit. 1794⁽¹¹⁾; 3d edit. 1801.

[²²¹ See the reply of M. de Rayneval to Mr. Jenkinson. Rayneval's *Liberté des Mers*, tom. i. p. 252.]—D.

(a) Wheaton's Hist. Law of Nations, 120-125.

[¹ For 1757 read 1758.]—G.G.W.

[¹¹ For 2d read new. There were other editions between 1758 and 1801.]—G.G.W.

belligerent and neutral powers the famous declaration of neutrality, the principles of which were acceded to by France, Spain, and the United States of America, as belligerent; and by Denmark, Sweden, Prussia, Holland, the Emperor of Germany, Portugal, and Naples, as neutral powers. By this declaration, which afterwards became the basis of the armed neutrality of the Baltic powers, the rule that free ships make free goods was adopted, without the previously associated maxim that enemy ships should make enemy goods. The court of London answered this declaration by appealing to the 'principles generally acknowledged as the law of nations, being the only law between powers where no treaties subsist;' and to the 'tenor of its different engagements with other powers, where those engagements had altered the primitive⁽ⁱ⁾ law by mutual stipulations, according⁽ⁱⁱ⁾ to the will and convenience of the contracting parties.'⁽ⁱⁱⁱ⁾ Circumstances rendered it convenient for the British government to dissemble its resentment towards Russia, and the other northern powers, and the war was terminated without any formal adjustment of this dispute between Great Britain, and the other members of the armed neutrality.^(a)²²²

The treaties
uniting the
two maxims,
not renewed.

§ 451. By the treaties of peace concluded at Versailles in 1783, between Great Britain, France, and Spain, the treaties of Utrecht were once more revived and confirmed. This confirmation was again reiterated in the commercial treaty of 1786, between France and Great Britain, by which the two kindred maxims were once more associated. In the negotiations at Lisle in 1797, it was proposed by the British plenipotentiary, Lord Malmesbury, to renew all the [586] former treaties between the two countries confirmatory of those of Utrecht. This proposition was objected to by the French ministers, for several reasons foreign to the present subject; to which Lord Malmesbury replied that these treaties were become the law of nations, and that infinite confusion would result from their not being renewed. It is probable, however, that his Lordship meant to refer to the territorial arrangements rather than to the commercial stipulations contained in these treaties. Be this as it may, the fact is, that they were not renewed, either by the treaty of Amiens in 1802, or by that of Paris in 1814.

The rules
disregarded
in the wars
of the
French
Revolution.

§ 452. During the protracted wars of the French Revolution, all the belligerent powers began by discarding in practice, not only the principles of the armed neutrality, but even the generally received

(a) Flassan, *Diplomatie Française*, tom. vii. pp. 183, 273. *Annual Register*, xxiii. 205, *State Papers*, 345-356; *State Papers*, xxiv. 300. *Wheaton's Hist. Law of Nations*, 294-305. [²²² See also *Trescot's Am. Diplomacy* (New York, 1852); and *Lord Mahon's History of England*, vii. 46.]—D.

[ⁱ For where those engagements had altered the primitive *read* those engagements have altered this primitive.]—G.G.W. [ⁱⁱ For according *read* proportioned.]—G.G.W.

[ⁱⁱⁱ The text here is not an exact quotation.]—G.G.W.

maxims of international law, by which the rights of neutral commerce in time of war had been previously regulated. 'Russia,' says Von Martens, 'made common cause with Great Britain and with Prussia, to induce Denmark and Sweden to renounce all intercourse with France, and especially to prohibit their carrying goods to that country. The incompatibility of this pretension with the principles established by Russia in 1780, was veiled by the pretext, that in a war like that against revolutionary France, the rights of neutrality did not come in question.' France, on her part, revived the severity of her ancient prize code, by decreeing, not only the capture and condemnation of the goods of her enemies found on board neutral vessels, but even of the vessels themselves laden with goods of British growth, produce, and manufacture.

§ 453. But in the further progress of the war, the principles which had formed the basis of the armed neutrality of the northern powers in 1780, were revived by a new maritime confederacy between Russia, Denmark, and Sweden, formed in 1800, to which Prussia acceded. This league was soon dissolved by the naval power of Great Britain and the death of the Emperor Paul; and the principle now in question was expressly relinquished by Russia in the convention signed at St. Petersburg in 1801, between that power and the British government, and subsequently acceded to by Denmark and Sweden. In 1807, in consequence of the stipulations contained in the treaty of Tilsit between Russia and France, a declaration was issued by the Russian court, in which the principles of the armed neutrality [587] were proclaimed anew, and the convention of 1801 was annulled by the Emperor Alexander. In 1812, a treaty of alliance against France was signed by Great Britain and Russia; but no convention respecting the freedom of neutral commerce and navigation has been since concluded between these two powers.^(a)

§ 454. The maritime law of nations, by which the intercourse of the European States is regulated, has been adopted by the new communities which have sprung up in the western hemisphere, and was considered by the United States as obligatory upon them during the war of their revolution. During that war, the American courts of prize acted upon the generally received principles of European public law, that enemy's property in neutral vessels was liable to, whilst neutral property in an enemy's vessel was exempt from, capture and confiscation; until Congress issued an ordinance recognizing the maxims of the armed neutrality of 1780, upon condition that they should be reciprocally acknowledged by the other belligerent powers. In the instructions given by Congress, in 1784, to their ministers appointed to treat with the different European courts, the same

The armed
neutrality
of 1800.

The inter-
national law
of Europe
adopted by
America,
and modi-
fied by
treaty.

(a) Wheaton's Hist. Law of Nations, 397-401.

principles were proposed as the basis of negotiation by which the independence of the United States was to be recognized. During the wars of the French Revolution, the United States, being neutral, admitted that the immunity of their flag did not extend to cover enemy's property, as a principle founded in the customary law and established usage of nations, though they sought every opportunity of substituting for it the opposite maxim of *free ships free goods*, by conventional arrangements with such nations as were disposed to adopt that amendment of the law. In the course of the correspondence which took place between the minister of the French Republic and the government of the United States, the latter affirmed that it could not be doubted that, by the general law of nations, the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. It was true, that several nations, desirous of avoiding the inconvenience of having their vessels stopped at sea, overhauled, carried into port, and detained, under pretence of having enemy's goods on board, had, in many instances, introduced, by special treaties, the [588] principle that enemy ships should make enemy goods, and friendly ships friendly goods; a principle much less embarrassing to commerce, and equal to all parties in point of gain and loss; but this was altogether the effect of particular treaty, controlling in special cases the general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it. England had generally determined to adhere to the rigorous principle, having in no instance, so far as was recollected, agreed to the modification of letting the property of the goods follow that of the vessel, except in the single one of her treaties with France. The United States had adopted this modification in their treaties with France, with the United Netherlands, and with Prussia; and, therefore, as to those powers, American vessels covered the goods of their enemies, and the United States lost their goods when in the vessels of the enemies of those powers. With Great Britain, Spain, Portugal, and Austria, the United States had then no treaties; and therefore had nothing to oppose them in acting according to the general law of nations, that enemy goods are lawful prize though found in the ships of a friend. Nor was it perceived that France could, on the whole, suffer; for though she lost her goods in American vessels, when found therein by England, Spain, Portugal, or Austria; yet she gained American goods when found in the vessels of England, Spain, Portugal, Austria, the United Netherlands, or Prussia; and as the Americans had more goods afloat in the vessels of those six nations, than France had afloat in their vessels, France was the gainer, and they the losers, by the principle of the treaty between the two countries. Indeed, the United States were the losers in every direction of that principle; for

when it worked in their favor, it was to save the goods of their friends; when it worked against them, it was to lose their own, and they would continue to lose whilst it was only partially established. When they should have established it with all nations, they would be in a condition neither to gain nor lose, but would be less exposed to vexatious searches at sea. To this condition the United States were endeavoring to advance; but as it depended on the will of other nations, they could only obtain it when others should be ready to concur.^(a)

[589] § 455. By the treaty of 1794 between the United States and Great Britain, article 17, it was stipulated that vessels, captured on suspicion of having on board enemy's property or contraband of war, should be carried to the nearest port for adjudication, and that part of the cargo only which consisted of enemy's property, or contraband for the enemy's use, should be made prize, and the vessel be at liberty to proceed with the remainder of her cargo. In the treaty of 1778, between France and the United States, the rule of *free ships free goods* had been stipulated; and, as we have already seen, France complained that her goods were taken out of American vessels without resistance by the United States; who, it was alleged, had abandoned by their treaty with Great Britain their antecedent engagements to France, recognizing the principles of the armed neutrality.

Conflict between the treaties the United States made with France and with Gt. Britain.

To these complaints, it was answered by the American government, that when the treaty of 1778 was concluded, the armed neutrality had not been formed, and consequently the state of things on which that treaty operated was regulated by the pre-existing law of nations, independently of the principles of the armed neutrality. By that law, free ships did not make free goods, nor enemy ships enemy goods. The stipulation, therefore, in the treaty of 1778 formed an exception to a general rule, which retained its obligation in all cases where not changed by compact. Had the treaty of 1794 between the United States and Great Britain not been formed, or had it entirely omitted any stipulation on this subject, the belligerent right would still have existed. The treaty did not concede a new right, but only mitigated the practical exercise of a right already acknowledged to exist. The desire of establishing universally the principle, that neutral ships should make neutral goods, was felt by no nation more strongly than by the United States. It was an object which they kept in view, and would pursue by such means as their judgment might dictate. But the wish to establish a principle was essentially different from an assumption that it is already established. However solicitous America might

(a) Mr. Jefferson's Letter to M. Genet, July 24, 1793: Waite's⁽¹⁾ State Papers, i. 134. See also President Jefferson's Letter to Mr. R. R. Livingston, American Minister at Paris, Sept. 9, 1801: Jefferson's Memoirs, iii. 489.⁽¹¹⁾

[¹ For Waite's read Wait's.]—G.G.W.

[¹¹ For 489 read 479.]—G.G.W.

be to pursue all proper means tending to obtain the concession of this principle by any or all of the maritime powers of Europe, she had never conceived the idea of obtaining that consent by force. The United States would only arm to defend their own rights: neither their policy nor their interests [590] permitted them to arm in order to compel a surrender of the rights of others.^(a)

Treaty of
1785 be-
tween
United
States and
Prussia.

§ 456. The principle of *free ships free goods*, had been stipulated by the treaty of 1785, article 12, between the United States and Prussia, without the correlative maxim of *enemy ships enemy goods*. By the 12th article of this treaty it was provided, that 'if one of the contracting parties should be engaged in war with any other power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter, with the belligerent powers, shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy.'

Instructions
to the
United
States min-
ister, to pro-
pose to
Prussia to
omit the
rule in a
new treaty.

§ 457. The above treaty having expired, by its own limitation, in 1796, a negotiation was commenced by the American and Prussian governments for its renewal.⁽ⁱ⁾ In the instructions given by the former to its plenipotentiary, Mr. J. Q. Adams, it was stated that the principle of *free ships free goods*, recognized in the 12th article, was a principle which the United States had adopted in all their treaties, (except that with Great Britain), and which they sincerely desired might become universal; but they had found by experience, that treaties formed for this object were of little or no avail; because the principle was not universally admitted among maritime nations. It had not been observed in respect to the United States, when it would operate to their benefit; and might be insisted on only when it would prove injurious to their interests. The American plenipotentiary was therefore directed to propose to the Prussian cabinet the abandonment of this article in the new treaty which he was empowered to negotiate.^(a)

[591] It was further stated, in an additional explanatory instruction given by the American government to its plenipotentiary, that, in

(a) Letter of the American Envoys at Paris, Messrs. Marshall, Pinkney,^[11] and Gerry, to M. de Talleyrand, Jan. 17, 1798: Waite's^[111] State Papers, iv. 38-47.

(a) Mr. Secretary Pickering to Mr. John Quincy Adams, Minister of the United States at Berlin, July 15, 1797.

[¹ The text of pages 494-505, while not an exact quotation, follows closely the correspondence to which reference is made.]—G.G.W.

[¹¹ For Pinkney read Pinckney.]—G.G.W.

[¹¹¹ For Waite's read Wait's.]—G.G.W.

the former instruction, the earnest wishes of the United States were meant to be expressed, that the principle of *free ships free goods* should become universal. This principle was peculiarly interesting to them, because their naval concerns were mercantile, and not warlike; and it would readily be perceived, that the abandonment of that principle was suggested by the measures of the belligerent powers, during the war then existing, in which the United States had found, that neither the obligations of the pretended modern law of nations, nor the solemn stipulations of treaties, secured its observation; on the contrary, it had been made the sport of events. Under such circumstances, it appeared to the President desirable to avoid renewing an obligation, which would probably be enforced when their interest might require its dissolution, and be contemned when they might derive some advantage from its observance. It was possible, that in the then pending negotiations of peace, the principle of *free ships free goods* might be adopted by all the great maritime powers; in which case, the United States would be among the first of the other powers to accede to it, and to observe it as a universal rule. The result of these negotiations would probably be known to the American plenipotentiary, before the renewal of the Prussian treaty; and he was directed to conform his stipulations on this point to the result of those negotiations. But if the negotiations for peace should be broken up, and the war continued, and more especially if the United States should be forced to become a party to it, then it would be extremely impolitic to confine the exertions of their armed vessels within narrower limits than the law of nations prescribes. If, for instance, France should proceed, from her predatory attacks on American commerce, to open war, the mischievous consequences of any other limitations would be apparent. All her commerce would be sheltered under neutral flags; whilst the American commerce would remain exposed to the havoc of her numerous cruisers.(b)

§ 458. In acknowledging the receipt of these instructions, the American plenipotentiary questioned the expediency of the proposed alteration, in the stipulation [592] contained in the 12th article of the treaty of 1785. He stated that the principle of making free ships protect enemy's property, had always been cherished by the maritime powers not having large navies, though stipulations to that effect had been, in all wars, more or less violated. In the then present war, indeed, they had been less respected than usual; because Great Britain had held a more uncontrolled command of the sea, and had been less disposed than ever to concede the principle; and because France had disclaimed most of the received and established ideas upon the law of nations, and considered herself as liberated from all the obligations towards other States which interfered with her present objects, or

Mr. J. Q. Adams's objections to the omission.

(b) Mr. Secretary Pickering to Mr. John Quincy Adams, July 17, 1797.

the interests of the moment. Even during that war, however, several decrees of the French Convention, passed at times when the force of solemn national engagements was felt, had recognized the promise contained in the treaty of 1778, between the United States and France; and, at times, this promise had been, in a great degree, observed. France was still attached to the principles of the armed neutrality, and yet more attached to the idea of compelling Great Britain to assent to them. Indeed, every naval State was interested in the maintenance of liberal maxims in maritime affairs, against the domineering policy of the latter power. Every instance, therefore, in which those principles which favor the rights of neutrality should be abandoned by neutral powers, was to be regretted, as furnishing argument, or at least example, to support the British doctrines. There was certainly a great inconvenience when two maritime States were at war, for a neutral nation to be bound by one principle to one of the parties, and by its opposite to the other; and, in such cases, it was never to be expected that an engagement favorable to the rights of neutrality would be scrupulously observed by either of the warring States. It appeared to the American plenipotentiary that the stipulation ought to be made contingent, and that the contracting parties should agree, that in all cases when one of the parties should be at war and the other neutral, the neutral bottom should cover enemy's property, *provided the enemy of the warring power admitted the same principle*, and practised upon it in their Courts of Admiralty; but if not, that the rigorous rule of the ordinary law of nations should be observed.^(a)

Mr. Adams
reconsiders
the subject.

[593] § 459. In a subsequent communication of the American plenipotentiary to his government, he states that he should be guided by its instructions relative to this matter, although he was still of opinion that the proposed alteration in the previous treaty would be inexpedient. Sweden and Prussia were both strongly attached to the principle of making the ship protect the cargo. They had more than once contended, that such is the rule even by the ordinary law of nations. A Danish writer of some reputation, in a treatise upon the commerce of neutrals in time of war, had laid it down as a rule, and argued formally, that, by the law of nature, free ships make free goods.^(a) Lampredi, a recent Florentine author, upon the same topic, had discussed the question at length; and contended that by the natural law, in this case, there is a collision of two rights equally valid; that the belligerent has a right to detain, but that the neutral has an equal right to refuse to be detained. This reduced the matter to a mere question of force, in which the belligerent, being armed, naturally

(a) Mr. John Quincy Adams to Mr. Secretary Pickering, Oct. 31, 1797; May 17, 1798.

(a) Hübner, *De la Saisie des Batimens Neutres*: Wheaton's Hist. Law of Nations, 219-229.

enjoys the best advantage.(b) He confessed that the reasoning of Lampredi had, in his mind, great weight, and that this writer appeared to have stated the question in its true light. Under these circumstances, he intended to propose a conditional article, putting the principle upon a footing of reciprocity, and agreeing that the principle, with regard to bottom and cargo, should depend upon the principle guiding the Admiralty Courts of the enemy. This would at once discover the American inclination and attachment to the liberal rule, and yet not make them the victims of their adherence to it, while violated by their adversaries. Acting under the instructions of his government, he should not accede to the renewal of the article, under its form in the previous treaty.(c)

§ 460. The American negotiator, following the letter of his instructions, proposed, in the first instance, to the Prussian plenipotentiaries, to substitute, instead of this article, the ordinary rule of the law of nations, which subjects to seizure enemy's property on board of neutral vessels. This proposition was supported, upon the ground that although the principle, which [594] communicates to the cargo the character of the vessel, would be conformable to the interests of the United States, of Prussia, and of all the powers preserving neutrality in maritime wars, if it could be universally acknowledged and respected by the belligerent powers, yet it was well known that the powers most frequently engaged in naval wars did not recognize, or, if they recognized, did not respect, the principle. The United States had experienced, during the then present war, the fact, that even the most formal treaty did not secure to them the advantage of this principle; but, on the contrary, only contributed to accumulate the losses of their citizens, by encouraging them to load their vessels with merchandise declared free, which they had, notwithstanding, seen taken and confiscated, as if no engagement had promised them complete security. At the then present moment, neither of the powers at war admitted the freedom of enemy's property on board of neutral vessels. If, in the course of events, either of the contracting parties should be involved in war with one or the other of those powers, she would be obliged to behold her enemy possess the advantage of a free conveyance for his goods, without possessing the advantage herself, or else to violate her own engagements, by treating the neutral party as the enemy should treat her.(a)

The proposal made to Prussia.

(b) Lampredi, *Del Commercio dei Popoli Neutrali in Tempo de*⁽¹⁾ *Guerra*: Wheaton's *Hist. Law of Nations*, 314, 319.

(c) Mr. John Quincy Adams to Mr. Secretary Pickering, May 25, 1798.

(a) Mr. John Quincy Adams to MM. Finkenstein,⁽¹¹⁾ Alvensleben, and Haugwitz, July 11, 1798.

[¹ *For de read di.*]—G.G.W.

[¹¹ *For Finkenstein read Finckenstein.*]—G.G.W.

The answer
of the Prus-
sian govern-
ment to this
proposal.

§ 461. The Prussian plenipotentiaries, in their answer to these arguments, stated that it could not be denied that the ancient principle of the freedom of navigation had been little respected in the two last wars, and especially in that which still subsisted; but it was not the less true that it had served, until the present time, as the basis of the commerce of all neutral nations; that it had been, and was still maintained, in consequence. If it should be suddenly abandoned and subverted, in the midst of the then present war, the following consequences would result:—

1. An inevitable confusion in all the commercial speculations of neutral nations, and the rejection of all the claims prosecuted by them in the Admiralty Courts of France and Great Britain, for illegal captures.

2. A collision with the northern powers, which sustained the ancient principle, at that very moment, by armed convoys.

3. Nothing would be gained in establishing, at the present mo-
[595]ment, the principle that *neutral property on board enemy vessels should be free from capture*. The belligerent powers would be no more disposed to admit this principle than the other, and it would furnish an additional reason to authorize their tribunals to condemn prizes made in contravention of the ancient rule.

4. Even supposing that the great maritime powers of Europe should be willing to recognize the principle proposed to be substituted by the United States, it would only increase the existing embarrassments incident to judicial proceedings respecting maritime captures; as, instead of determining the national character of the cargo by that of the vessel, it would become necessary to furnish separate proofs applicable to each.

The clause
proposed by
the Prussian
government.

§ 462. All these difficulties combined induced the Prussian minister to insist on inserting the 12th article of the treaty of 1785 in the new treaty, qualified with the following additional stipulation:—

‘That experience having unfortunately proved, in the course of the present war, that the ancient principle of free neutral navigation has not been sufficiently respected by the belligerent powers, the two contracting parties propose, after the restoration of a general peace, to agree, either separately between themselves, or jointly with the other powers alike interested, to concert with the great maritime powers of Europe such an arrangement as may serve to establish, by fixed and permanent rules, the freedom and safety of neutral navigation in future wars.’(a)

The reply of
Mr. Adams.

§ 463. The American negotiator, in his reply to this communication, stated, that the alteration in the former treaty, proposed by his

(a) MM. Finkenstein,⁽¹⁾ Alvensleben, and Haugwitz, to Mr. John Quincy Adams, 25th September, 1798.

[1 For Finkenstein read Finckenstein.]—G.G.W.

government, was founded on the supposition, that, by the ordinary law of nations, enemy's property, on board of neutral vessels, is subject to capture, whilst neutral property, on board of enemy's vessels, is free. That this rule could not be changed but by the consent of all maritime powers, or by special treaties, the stipulations of which could only extend to the contracting parties. That the opposite principle, the establishment of which was one of the main objects of the armed neutrality during the war of American Independence, had not been universally recognized even at that period; and had not been observed, during the then present war, by any one of the powers who acceded to [596] that system. That Prussia herself, whilst she remained a party to the war against France, did not admit the principle; and that, at the then present moment, the ancient principle of the law of nations subsisted in its whole force between all the powers, except in those cases where the contrary rule was stipulated by a positive treaty.

In proposing, therefore, to recognize the freedom of neutral property on board of enemy's vessels, and to recognize, as subject to capture, enemy's property on board of neutral vessels, nothing more was intended than to confirm by the treaty those principles which already existed independently of all treaty; it was not intended to make, but to avoid a change, in the actual order of things.

Far from wishing to dictate, in this respect, to the belligerent powers, it had not been supposed that an agreement between Prussia and the United States could, in any manner, serve as a rule to other powers not parties to the treaty, in respect to maritime captures; and as the effect of such a convention, even between the contracting parties, would not be retroactive, but would respect the future only, it had been still supposed that the just claims of the subjects of neutral powers, whether in England or in France, on account of illegal captures, could be in any manner affected by it.

Nor had it been apprehended that such a convention would produce any collision with the northern powers, since they could not be bound by a treaty to which they were not parties; and this supposed contradiction would still less concern Russia, because, far from having maintained the principle that the neutral flag covers enemy's property, she had engaged by her convention with Great Britain, of the 25th of March, 1793, to employ all her efforts against it during the then present war.

Sweden and Denmark, by their convention of the 27th March, 1794, engaged reciprocally towards each other, and towards all Europe, not to claim, except in those cases expressly provided for by treaty, any advantage not founded upon the universal law of nations, 'recognized and respected unto the present time by all the powers and by all the sovereigns of Europe.' It was not conceived possible to include, under

this description, the principle that the cargo must abide the doom of the flag under which it is transported; and it might be added, that experience had con[597]stantly demonstrated the insufficiency of armed convoys to protect this principle, since they were seen regularly following, without resistance, the merchant vessel under their convoy into the ports of the belligerent powers, to be there adjudged according to the principles established by their tribunals; principles which were entirely contrary to that by which the ship neutralizes the cargo.

According to the usage adopted by the tribunals of all maritime States, the proofs as to the national character of the cargo ought to be distinct from those which concern that of the vessel. Even in those treaties which adopt the principle that the flag covers the property, it is usual to stipulate for papers applicable to the cargo, in order to show that it is not contraband. The charter-party and the bills of lading had been referred to by the Prussian ministers, as being required by the Prussian tribunals, and which it was proposed to designate as essential documents in the new treaty. It would seem, then, that the adoption of the principle in question would not require a single additional paper, and, consequently, would not increase the difficulty of prosecuting claims against captors; at the utmost, it could only be regarded as a very small inconvenience, in comparison with the losses occasioned by the recognition of a principle already abandoned by almost all the maritime powers, and which had been efficaciously sustained by none of them; of a principle which would operate injuriously to either of the contracting parties that might be engaged in war, whilst its enemy would not respect it, and that party which remained neutral would hold out to its subjects the illusory promise of a free trade, only to see it intercepted and destroyed.

But as the views of the Prussian government appeared, in some respects, to differ from those of the American, in regard to the true principle of the law of nations, and it appeared to the Prussian ministers that several inconveniences might result from the substitution of the opposite principle to that contained in the former treaty, the American negotiator proposed, as an alternative, to omit entirely the stipulations of the 12th article in the new treaty; the effect of which would be, to leave the question in its then present situation, without engaging either of the contracting parties in any special stipulation respecting it. And as the establishment of a permanent and stable system, with the hope of seeing it maintained and respected in future wars, was an important object to commerce in general, and especially to that of the [598] contracting parties, he was willing to consent to an eventual stipulation similar to that proposed by the Prussian ministers; but which, without implying, on either part, the admission of a contested principle, should postpone the decision of it until after the general peace, either by an

ulterior agreement between the contracting parties, or in concert with other powers interested in the question. The United States would always be disposed to adopt the most liberal principles that might be desired, in favor of the freedom of neutral commerce in time of war, whenever there should be a reasonable expectation of seeing them adopted and recognized in a manner that might secure their practical execution.^(a)

§ 464. The Prussian ministers replied to this counter-proposition, by admitting that the rule by which neutral property, found on board enemy vessels, was free from capture, had been formerly followed by the greater part of European powers, and was established in several treaties of the fourteenth and fifteenth centuries; but they asserted that it had been abandoned by maritime and commercial nations, ever since the inconveniences resulting from it had become manifest. In the two treaties concluded as early as 1646, by the United Provinces, with France and with England, the rules of free ships free goods, and of enemy ships enemy goods, were stipulated; and these principles, once laid down, had been repeated in almost all the treaties since concluded between the different commercial nations of Europe. The convention of 1793, between Russia and England, to which the American negotiator had referred, was exclusively directed against France, and merely formed an exception to the rule; and if, during the commencement of the revolutionary war, the allied powers deemed it necessary to deviate from the recognized principle, this momentary deviation could only be attributed to peculiar circumstances, and it was not the less certain that Prussia had never followed any other than one and the same permanent system, relative to neutral commerce and navigation. This system was founded upon the maxim announced in the 12th article of her former treaty with the United States, which best accorded with the general convenience of commercial nations, by simplifying the proofs of national character, and ex[599]empting neutral navigation from vexatious search and interruption.

Replica-
tion of the
Prussian
ministers, to
Mr. Adams's
counter-
proposition.

The Prussian ministers also declared their conviction that, during the then present war, when the commerce and navigation of neutral nations had been subjected to so many arbitrary measures, the principle proposed by the American negotiator would not be more respected than the former rule; several recent examples having demonstrated that even neutral vessels, exclusively laden with neutral property, had been subjected to capture and confiscation, under the most frivolous pretexts. But it would be useless to prolong the discussion, as both the parties to the negotiation were agreed that, instead of hazarding a new

(a) Mr. John Quincy Adams to MM. Finkenstein,⁽¹⁾ Alvensleben, and Haugwitz, Oct. 29, 1798.

[¹ For Finkenstein read Finckenstein.]—G.G.W.

stipulation, eventual and uncertain in its effects, it would be better to leave it in suspense until the epoch of a general peace, and then to seek for the means of securing the freedom of neutral commerce upon a solid basis during future wars.

Second
proposal of
the Prussian
ministers.

§ 465. The Prussian ministers, therefore, proposed to suppress provisionally the 12th article of the former treaty, and to substitute in its place the following stipulation:—‘Experience having demonstrated, that the principle adopted in the 12th article of the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the last two wars, and especially in that which still subsists; and the contradictory dispositions of the principal belligerent powers not allowing the question in controversy to be determined in a satisfactory manner at the present moment, the two high contracting parties propose, after the return of a general peace, to agree, either separately between themselves, or conjointly with other powers alike interested, to concert with the great maritime powers of Europe such arrangements and such permanent principles, as may serve to consolidate the liberty of neutral navigation and commerce in future wars.’^(a)

Mr Adams
proposes to
omit one
part of the
Prussian
proposal, re-
flecting on
the belliger-
ent powers.

§ 466. In his reply to this note, the American negotiator declared that he would not hesitate to subscribe to the stipulation proposed by the Prussian ministers, if the following words could be omitted: ‘And the contradictory dispositions of the principal belligerent powers not allowing the question in controversy to be determined in [600] a satisfactory manner at the present moment.’ It was possible that the belligerent powers might find in these expressions a kind of sanction to their dispositions, which would not accord with the intentions of the contracting parties; and, besides, the American negotiator would desire to omit entirely an allusion to a point, of which it was the wish of the two governments to defer the consideration, rather than to announce it formally as a contested question.

In order to justify the opinion of his government on the subject of the principle in question, he deemed it his duty to observe, that this opinion was not founded on the treaties of the fourteenth and fifteenth centuries. He considered the principle of the law of nations as absolutely distinct from the engagements stipulated by particular treaties. These treaties could not establish a fixed principle on this point; because such stipulations bound only the parties by whom they were made, and the persons on whom they operated; and because, too, in the seventeenth and eighteenth centuries, as well as in the fourteenth and fifteenth, different treaties had adopted different rules for each

(a) MM. Finkenstein,⁽¹⁾ Alvensleben, and Haugwitz, to Mr. John Quincy Adams, 29th October, 1798.

[¹ For Finkenstein read Finckenstein.]—G.G.W.

particular case, according to the convenience and agreement of the contracting parties.

§ 467. Rejecting, therefore, all positive engagements stipulated in treaties, it might well be doubted whether a single example could be found, antecedent to the American war, of a maritime belligerent power which had adopted the principle, that enemy's property is protected by a neutral flag. For, without speaking of England, whose system in this respect is known, France, by the Ordinance of 1774, renewing the provisions of that of 1681, declared enemy's property, on board neutral vessels, subject to seizure and confiscation. It excepted from this rule the ships of Denmark and the United Provinces, conformably to the treaties then existing between these powers and France. This ordinance continued to have its effect in the French tribunals until the epoch of the Ordinance of the 26th July, 1778. By the first article of this last ordinance the freedom of enemy's property, on board of neutral ships, is yielded to neutrals as a favor, but not as a principle of the law of nations, since the power is reserved to withdraw it at the expiration of six months, if a reciprocal stipulation should not be conceded by the enemy. Spain, by the Ordinance of the 1st of July, 1779, and [601] the 13th March, 1780, ordered, in like manner, the seizure and confiscation of enemy's property, found on neutral vessels.

Mr. Adams's argument in favor of the historical existence of the right in question.

It would only be added that a celebrated public jurist, a Prussian subject, who, in the first part of the 18th century, wrote a highly esteemed work upon the law of nations, Vattel, says expressly, (Book 3, sect. 115,) that 'when effects belonging to an enemy are found on board a neutral vessel, they may be seized by the laws of war.' He cited no example where the opposite principle had been practised or insisted on.

§ 468. When, however, the system of armed neutrality was announced, the United States, although a belligerent power, hastened to adopt its principles; and during the period succeeding this epoch, in which they were engaged in war, they scrupulously conformed to them. But on the first occasion when, as a neutral power, they might have enjoyed the advantages attached to this system, they saw themselves deprived of these advantages, not only by the powers who had never acceded to those principles, but also even by the founders of the system. The intentions of the combined powers, it was true, were exclusively directed against France; but the operation of their measures did not less extend to all neutrals, and especially to the United States. However peculiar might have been the circumstances of the war, the rights of neutrality could not be thereby affected. The United States had regretted the abandonment of principles favorable to the rights of neutrality, but they had perceived their inability to prevent it; and were persuaded that equity could not require of them to be the victims, at the same time, both of the rule and of the exception; to be bound,

Mr. Adams explains the diplomatic position of the United States on the subject.

as a belligerent party, by laws of the advantage of which, as a neutral power, they were wholly deprived.

It was the wish, however, of the United States government to prove, that it had no desire to depart from the principles adopted by the treaty of 1785, except upon occasions when an adherence to those principles would be an act of injustice to the nation whose interests were confided to it. The American negotiator therefore agreed to adopt the proposed new stipulation, excepting the words above cited, and adding the following clause:—

‘And if, during this interval, one of the high contracting parties shall be engaged in a war, to which the other is neutral, the belligerent power will respect all the property of enemies laden on [602] board the vessel of the neutral party, provided that the other belligerent power shall acknowledge the same principle with regard to every neutral vessel, and that the decisions of his maritime tribunals shall conform to it.’

If this proposition should not be acceptable to the Prussian cabinet, then the American negotiator proposed to adopt nearly the formula of the treaty of 1766 between Prussia and Great Britain, and to stipulate that ‘as to the search of merchant vessels, in time of war, the vessels of war and the private armed vessels of the belligerent power will conduct themselves as favorably as the objects of the then existing war will permit; observing, as much as possible, the principles and rules of the law of nations as generally recognized.’^(a)

The clause
finally
agreed upon.

§ 469. The treaty was finally concluded on the 11th July, 1799, with the article on this subject proposed by the Prussian plenipotentiaries, and modified on the suggestion of the American negotiator in the following terms:—

‘ART. 12. Experience having proved that the principle adopted in the twelfth article of the treaty of 1785, according to which *free ships make free goods*, has not been sufficiently respected during the last two wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree, either separately between themselves, or jointly with other powers alike interested, to concert with the great maritime powers of Europe such arrangements and such permanent principles, as may serve to consolidate the liberty and the safety of the neutral navigation and commerce in future wars. And if, in the interval, either of the contracting parties should be engaged in war, to which the other should remain neutral, the ships of war and privateers of the belligerent power shall conduct themselves towards the merchant vessels of the neutral power, as favor-

(a) Mr. John Quincy Adams to MM. Finkensteen,⁽¹⁾ Alvensleben, and Haugwitz, 24th December, 1799.

[¹ For Finkensteen read Finckenstein.]—G.G.W.

ably as the course of the war then existing may permit; observing the principles and rules of the law of nations generally acknowledged.'^(a)⁽¹⁾

§ 470. On the expiration of the treaty of 1799, the twelfth article of the original treaty of 1785 was again revived, by the present subsisting treaty between the [603] United States and Prussia of 1828, with the addition of the following clause:—

The subject, as it stands between the United States and Prussia, in the treaty of 1828.

'The parties being still desirous, in conformity with their intention declared in the twelfth article of the said treaty of 1799, to establish between themselves, or in concert with other maritime powers, further provisions to insure just protection and freedom to neutral navigation and commerce, and which may at the same time advance the cause of civilization and humanity, engage again to treat on this subject at some future and convenient period.'

§ 471. During the war which commenced between the United States and Great Britain in 1812, the prize courts of the former uniformly enforced the generally acknowledged rule of international law, that enemy's goods in neutral vessels are liable to capture and confiscation, except as to such powers with whom the American government had stipulated by subsisting treaties the contrary rule, that free ships should make free goods.

The prize courts of the United States condemn enemy's goods in neutral ships.

§ 472. In their earliest negotiations with the newly established republics of South America, the United States proposed the establishment of the principle of *free ships free goods*, as between all the powers of the North and South American continents. It was declared that the rule of public law—that the property of an enemy is liable to capture in the vessels of a friend, has no foundation in natural right, and, though it be the established usage of nations, rests entirely on the abuse of force. No neutral nation, it was said, was bound to submit to the usage; and though the neutral may have yielded at one time to the practice, it did not follow that the right to vindicate by force the security of the neutral flag at another, was thereby permanently sacrificed. But the neutral claim to cover enemy's property was conceded to be subject to this qualification: that a belligerent may justly refuse to neutrals the benefit of this principle, unless admitted also by their enemy for the protection of the same neutral flag. It is accordingly stipulated, in the treaty between the United States and the Republic of Colombia, that the rule of *free ships free goods* should be understood 'as applying to those powers only who recognize this principle; but if either of the two contracting parties shall be at war with a third, and the other neutral, the flag of the neutral shall cover the [604] property of enemies whose governments acknowledge the same principle, and not of others.' The same restriction of the rule had been previously

The treaties of the United States with the South American republics, on this subject.

(a) American State Papers, fol. edit. ii. 251-269.

[¹ See footnote i, p. 494.]—G.G.W.

incorporated into the treaty of 1819, between the United States and Spain, and has been subsequently inserted in their different treaties with the other South American Republics. (a)

A neutral
ship at-
tempting to
cover ene-
my's prop-
erty by
false papers,
&c.

§ 473. It has been decided in the prize courts, both of the United States and of Great Britain, that the privilege of the neutral flag of protecting enemy's property, whether stipulated by treaty or established by municipal ordinances, however comprehensive may be the terms in which it may be expressed, cannot be interpreted to extend to the fraudulent use of that flag to cover enemy's property in the *ship*, as well as the cargo. (a) Thus during the war of the Revolution, the United States, recognizing the principles of the armed neutrality of 1780, exempted by an ordinance of Congress all neutral vessels from capture, except such as were employed in carrying contraband goods, or soldiers, to the enemy; it was held by the continental Court of Appeals in prize causes, that this exemption did not extend to a vessel which had forfeited her privilege by grossly unneutral conduct in taking a decided part with the enemy, by combining with his subjects to wrest out of the hands of the United States, and of France, their ally, the advantages they had acquired over Great Britain by the rights of war in the conquest of Dominica. By the capitulation of that island, all commercial intercourse with Great Britain had been prohibited. In the case in question, the vessel had been purchased in London, by neutrals, who supplied her with false and colorable papers, and assumed on themselves the ownership of the cargo for a voyage from London to Dominica. Had she been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be seized as prize of war; because Congress had said, by their ordinance, that the rights of neutrality should extend protection to such effects and goods of an enemy. But if the neutrality were violated, [605] Congress had not said that such a violated neutrality shall give such protection. Nor could they have said so, without confounding all the distinctions of right and wrong; and Congress did not mean, in their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, to the exclusion of all other cases; for the instances not mentioned were as flagrant as the cases particularized. (b)

By the treaty of 1654, between England and Portugal, it was stipulated, (art. 23,) "That all goods and merchandise of the said Republic or King, or of their people, or subjects found on board the ships of the enemies of either, shall be made prize, together with the ships,

(a) Mr. Secretary Adams's Letter to Mr. Anderson, American Minister to the Republic of Colombia, 27th of May, 1823. For the practice of the prize court, as to the allowance or refusal of freight on enemy's goods taken on board neutral ships, and on neutral goods found on board an enemy's ship, see Wheaton's Rep. ii. Appendix, note I. 54-56.

(a) The Citade de Lisboa, Robinson's Adm. Rep. vi. 358.

(b) The Erstern, Dallas's Rep. ii. 34.

and confiscated. But all the goods and merchandise of the enemies of either on board the ships of either, or of their people or subjects, shall remain free and untouched.'

§ 474. Under this stipulation, thus coupling the two opposite maxims of *free ships free goods*, and *enemy ships enemy goods*, it was determined by the British prize courts, that the former provision of this article, which subjects to condemnation the goods of either nation found on board the ships of the enemy of the other contracting party, could not be fairly applied to the case of property *shipped before the contemplation of war*. Sir W. Scott (Lord Stowell) observed, in delivering his judgment in this case, that it did not follow, that because *Spanish* property put on board a *Portuguese* ship, would be protected in the event of the interruption of war, therefore *Portuguese* property on board a *Spanish* ship should become instantly confiscable on the breaking out of hostilities with Spain: that, in one case, the conduct of the parties would not have been different, if the event of hostilities had been known. The cargo was entitled to the protection of the ship, generally, by this stipulation of the treaty, even if shipped in open war; and *a fortiori*, if shipped under circumstances still more favorable to the neutrality of the transaction. In the other case, there might be reason to suppose, that the treaty referred only to goods shipped on board an enemy's vessel, in an avowed hostile character; and that the neutral merchant would have acted differently, if he had been apprised of the character of the vessel at the time when the goods were put on board.^(a)

[606] § 475. The same principle has been frequently incorporated into treaties between various nations, by which the principle of *free ships free goods* is associated with that of *enemy ships enemy goods*. The treaties of Utrecht expressly recognize it, and it has been also incorporated into the different treaties between the United States and the South American Republics, with this qualification, that 'it shall always be understood, that the neutral property found on board such enemy's vessels shall be held and considered as enemy's property, and as such shall be liable to detention and confiscation, except such property as was put on board such vessel before the declaration of war, or even afterwards, if it were done without the knowledge of it; but the contracting parties agree that *two* months having elapsed after the declaration, their citizens shall not plead ignorance thereof.'^(a)²²³

(a) The *Marianna*, Robinson's Adm. Rep. v.⁽¹⁾ 28.

(a) Treaty of 1828,⁽¹¹⁾ between the United States and Colombia, art. 13. By the treaty of 1831, between the United States and Mexico; by that of 1834⁽¹¹¹⁾ with Chili, art. 13, the term of *four* months is established for the same purpose; and by that of 1842^(1v) with Equador, art. 16, the term of *six* months.

[²²³ *Free Ships, Free Goods*.—The second article of the Declaration of Paris of 1856 forms

[¹ For v. read vi.]—G.G.W.

[¹¹¹ For 1834 read 1832.]—G.G.W.

[¹¹ For 1828 read 1824.]—G.G.W.

[^{1v} For 1842 read 1839.]—G.G.W.

Contraband
of war.

[607] § 476. The general freedom of neutral commerce with the respective belligerent powers is subject to some exceptions. Among

a new era in the history of this doctrine of 'free ships, free goods.' It is partly in these words: 'The neutral flag covers enemy's goods, with the exception of contraband of war.' (The third article, that neutral goods not contraband are not seizable under the flag of an enemy, is of little importance, as that was already the law of nations; and the article had only the effect of abrogating clauses to the contrary in subsisting treaties between any of the powers that were parties to it.)

The author's text and notes give the history of the subject down to 1847.

The United States and Great Britain have long stood committed to three points, as, in their opinion, established in the law of nations—(1) That a belligerent may take enemy's goods from neutral custody on the high seas; (2) That neutral goods are not subject to capture from the mere fact that they are on board an enemy's vessel; and (3) That the carrying of enemy's goods by a neutral is no offence, and, consequently, not only does not involve the neutral vessel in penalty, but entitles it to its freight from the captors, as a condition to a right to interfere with it on the high seas. Great Britain has sustained these rules by uniform judicial decisions, and by the concurrent opinions of her leading text-writers. (Phillimore's Intern. Law, iii. §§ 161-212. Manning's Law of Nations, 203-280. Wildman's Intern. Law, ii. 136.) While the government of the United States has endeavored to introduce the rule of 'free ships, free goods,' by conventions, her courts have always decided that it is not the rule of war; and her diplomatists and her text-writers—with singular concurrence, considering the opposite diplomatic policy of the country—have agreed to that position. (Wheaton, *suprà*; Kent's Comm. i. 124-130; Halleck's Intern. Law, 632-635; and Woolsey's Introd. § 170.)

Beside the authority of the Consolato del Mare, the right to take enemy's goods from neutral ships has been sustained by Grotius (iii. 6, 26; i. 5, note 6), Zouch (Jus Feciale, ii. 5, 6, 8⁽¹⁾), Bynkershoek (Quæst. i. 13, 14), Heineccius (de Navium [607] Comm. ii. 8, 9), Loccenius (de Jure Marit. ii. 4, 12), Vattel (iii. 115), Albericus Gentilis (Hisp. Advoc. i. cap. 27), Azuni (Dritto Maritimo, Part II, ch. 3, arts. 1, 2). It has been denied by Klüber (§ 299), De Martens (ii. §§ 316, 322), and by Massé (Droit Comm. liv. ii. tit. 1, ch. 2, § 2). Hautefeuille, after a full comparison and discussion of the arguments of the text-writers and the history of the treaties, states his conclusion strongly against the right. (Droits des Nat. Neutr., ii. tit. 10, ch. 1-3.) But it is to be observed, that these latter writers argue the question as one of abstract right and policy, rather than of the usage of nations, as established by judicial decisions adopted or acquiesced in by States, and confirmed by treaties. Ortolan balances the arguments and usages fairly, rejecting some of the arguments urged against the right, and expresses his satisfaction that the Declaration of Paris of 1856 has settled the question in favor of the exemption of the neutral goods, as his own opinion inclined. (Règl. Intern. ii. ch. 5.) Heffter gives rather a history of the controversy than an opinion upon it, but discards the alleged connection between the two maxims,—'Frei Schiff, frei Gut,' 'Unfrei Schiff, unfrei Gut.' (Europ. Völker. §§ 162-66.)

From 1786 to 1854, Great Britain made no treaty limiting her belligerent right as to enemy's goods in neutral ships; and her only previous treaty that did so, and survived the first shock of the wars of the French Revolution,—that of 1654 with Portugal,—was abrogated by the treaty of 1810, and the abrogation confirmed and continued by that of 1842. (Martens, Recueil, tom. iii. p. 347.⁽¹¹⁾)

Dr. Woolsey (§ 172) gives, in a condensed form, the results of his examination into the history of the *cantilena*, 'free ships, free goods.' He states them in five propositions—(1) In mediæval Europe, there was an opinion that neutral trade could be declared unlawful by belligerents, which led to the occasional practice of condemning neutral ships for carrying enemy's goods. (2) With the growth and power of commerce, came the right to carry enemy's goods and to put goods in enemy's vessels, subject only to the right of the belligerent to search vessels, and take them in for adjudication on what should be actually enemy's property. (3) During the seventeenth and eighteenth centuries, the treaties had no line of principle, but of varying policy; and, where free ships were permitted to make free goods, the treaties often joined the accidental and merely verbal converse, of hostile ships making hostile goods. (4) After 1775, neutral nations, and those with inferior naval power, usually endeavored to

[¹ For ii, 5, 6, 8 read ii, sec. viii, 5, 6, 8.]—G.G.W.

[¹¹ For 347 read 327.]—G.G.W.

these is the trade with the enemy in certain [608] articles called contraband of war. The almost unanimous authority of elementary writers,

incorporate the rule of 'free ships, free goods' into the law of nations, but were prevented by Great Britain. (5) Since 1815, the increasing power of trade and capital is leading to the adoption of the rule. Dr. Woolsey might have added, that the rule, however adopted in treaties or declarations, has, so far, never survived the exigencies of a great war, or a change in the commercial interests of the nation adopting it.

The Consolato del Mare, in the thirteenth century, admits the right to capture enemy's goods in neutral vessels, on terms of compensation to the neutral carrier. (Pardessus, ii. 303-307, Consolato del Mare, ch. 231.) Manning (244-248) and Ward (126-7) say that the treaties before the seventeenth century coincide with the doctrine of the Consolato del Mare. (For the varying treaties on the subject during the seventeenth and eighteenth centuries, see Phillimore's Intern. Law, §§ 173-212, and note *n* to § 262; and Ward, 126-152; also, Woolsey's Introd. §§ 173-175.)

The United States, in its treaty with England of 1795,^[1] admitted the right to capture enemy's goods in neutral vessels. But our treaties with France in 1778, 1780,^[11] and 1800, with the Netherlands in 1782, with Sweden in 1783, 1816, and 1827, make [608] goods free in neutral ships, and subject neutral goods to capture in enemy's vessels. Our treaties with Prussia in 1785 and 1828, with Spain in 1795 and 1819, with the Two Sicilies in 1855, with Peru in 1856, with Russia in 1854, with Colombia in 1824, with Central America in 1825, with Brazil in 1828, with Mexico in 1831, with Chili in 1832, with Peru-Bolivia in 1835,^[111] and with Venezuela in 1836, secure the freedom of enemy's goods in neutral ships, without declaring the right to take neutral goods in enemy's ships. (Some of these treaties have peculiar explanations or qualifications to the rule of 'free ships, free goods,' which will be noticed below.) Indeed, the two propositions, 'free ships, free goods,' and 'enemy ships, enemy goods,' have no real connection with each other. They have been connected by an arbitrary and accidental cast of language. The general principle, clear of violations of laws of war, is that all property, whether vessels or cargo, is to be judged by its own relation to the belligerent. If it is enemy's property, in the sense of the prize law, it is condemned, whether it be vessel or cargo. Heffter properly says that this is but an application of the maxim, *sumum cuique*. (Europ. Völker. § 162; and see note 220, *ante*.) If it is neutral, it is restored. Each stands on its own character and predicament; and it is not a violation of the laws of war for a neutral to carry cargo belonging to citizens of a country engaged in war, or to put his own goods in a vessel of such citizens. Where carrying contraband goods, or endeavoring to break blockade, subjects a vessel to capture, it is for other reasons, and irrespective of the national character of vessel or cargo.

The history of the relations of the United States to the Articles of Paris of 1856, is given in detail in the note 173, *ante*, on Privateers. The summary is, that, when asked to give in our adhesion to the four articles, the reply was that we were not willing to debar ourselves from the right to use privateers in any possible exigency of war, as our policy was to have a small navy, and we always had a large and very much exposed commerce; but that we would agree to the articles, if all private property at sea should be held exempt from capture. This, known as the 'American Amendment,' or 'Marcy Amendment,' was well received by the other parties to the Articles of Paris, but was prevented from being adopted by the opposition of England. Subsequently, the United States withdrew its proposal; seemingly unwilling to renounce the right to use privateers, even on the terms of exemption of all private property. At the outset of our civil war, the United States proposed conventions adopting the Articles of Paris as they stood, without waiting for the recognition of the exemption of all private property. This failed, because Great Britain and France insisted upon the addition of an explanatory clause, intended to meet their own possible relations with the vessels of war or privateers of the rebel Confederacy, to which the United States government would not agree.

When the Crimean war began, as England claimed the right to capture enemy's goods in neutral vessels, and France the right to capture neutral goods in enemy's vessels, and the two powers were in alliance, there seemed no escape for neutral commerce. This compelled an agreement, which resulted in declarations of the two powers, in March, 1854, exempting

[¹ For 1795 read 1794.]—G.G.W.
[¹¹¹ For 1835 read 1836.]—G.G.W.

[¹¹ Omit 1780.]—G.G.W.

of prize ordinances, and of treaties, agrees to enumerate among these all warlike instruments, or materials by their own nature fit to be used

enemy's goods in neutral vessels, and neutral goods in enemy's vessels. Great Britain is careful to put the former on the ground of a special and temporary policy. 'To preserve the commerce of neutrals, Her Majesty is willing, for the present, to waive a part of the belligerent [609] rights appertaining to her by the law of nations. . . . Her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.'

This rule, being followed through that war, was, as we have seen, adopted by nearly all the maritime powers of the world, large and small, except the United States, in the Declaration of Paris. But it has been seen that this rule, established in previous treaties, has always been bent or broken in the stress of national exigencies. Indeed, it is extremely liable to be so, until all maritime nations agree to it, so that it can be enforced everywhere as a part of international law. If a nation, not a party to such a convention, is at war with one that is, it will capture its enemy's goods in neutral vessels. If the enemy retaliates, it is to the disadvantage of the neutrals, for whose benefit the rule was made, and who are parties to the convention with him. Again, in a war where both belligerents and the neutral are parties to this convention, and the neutral allows the goods of one belligerent to be taken from its vessels by the other, without resistance or remonstrance, or is suspected of doing so, or if one belligerent is suspected of not adhering to the rule, the other breaks it in the way of retaliation. By the treaty of 1778 between France and the United States, the rule of 'free ships, free goods' was stipulated. France complained that her goods were taken out of American vessels by British cruisers, without resistance or remonstrance on the part of the United States, between whom and Great Britain that rule did not prevail. This resulted in an abrogation of the rule, by *ex parte* acts of each government, until the treaty of 1800, when it was renewed. By the treaty between the United States and Russia of 22d July, 1854 (art. 1), and with the Two Sicilies, 1855 (arts. 1, 2), and with Peru of 1856 (arts. 1, 2, 3), it is stipulated that, between the parties, free ships shall make goods free, when not contraband of war. And they 'engage to apply these principles to the commerce and navigation of all such powers and States as shall consent to adopt them, on their part, as permanent and immutable;' and declare that they will 'take the stipulation contained in art. 1 as a rule, whenever it shall become a question, to judge of the rights of neutrality.' And they agree that 'all nations which shall consent to accede to the rules of the first article of this convention,^[1] shall enjoy the rights resulting from such accession, as they shall be enjoyed and observed by the two powers signing this convention.' (United States Laws and Treaties, x. 215.)

In the treaties of the United States with Spain and the South American powers, where this rule is established, it is with certain conditions and restrictions. In the treaty with Spain of 1819, art. 12, the following clause is added to the previous stipulation, in the treaty of 1795, that the neutral flag shall cover enemy's goods: 'But, if either of the two contracting parties shall be at war with a third party, and the other [contracting party shall be] neutral, the flag of the neutral shall cover the property of enemies whose government acknowledges this principle, and not of others.' This exception, or perhaps it should be called explanation, is repeated in the treaty with Colombia of 1824, art. 12 (U. S. Laws, viii. 312), and, in substantially [610] the same form, in the other South American treaties: with Central America of 1825 (Ibid. 328), with Brazil of 1828 (Ibid. 393), with Mexico of 1831 (Ibid. 416), with Chili of 1832 (Ibid. 436), with Peru-Bolivia of 1835^[11] (Ibid. 491), with Venezuela of 1836 (Ibid. 466).

It is in the light of these special clauses in the Russian, Spanish, and South American treaties, and of the state of things that made their introduction expedient, that the articles of the Declaration of Paris must be viewed. The circular of Mr. Cass, Secretary of State, of 29th June, 1859, on the Declaration of Paris, while admitting the right of nations to stipulate for the reciprocal protection of each other's goods found in neutral vessels when they shall be at war with each other, and so indirectly to relieve neutral vessels from annoyance and loss, adds, 'Those neutral nations which are prevented from being parties to such an engagement, have a right to insist that it shall not necessarily work to their injury. This dictate of justice would be palpably violated in the case of the United States, should this protecting clause of

[¹ Omit quotation mark before take and insert before art. 1.]—G.G.W.

[¹¹ After convention, a clause is omitted.]—G.G.W.

[¹¹¹ For 1835 read 1836.]—G.G.W.

in war. Beyond these, [609] there is some difficulty in reconciling the conflicting authorities derived from the opinions of public jurists, the

the Paris conference not enable these vessels, when neutral, to shield from capture the property of belligerents carried as freight.'

On the other hand, a writer in the *Edinburgh Review* (No. 233), says, as to the principle of the second Article of Paris, 'the United States have acquired no right to invoke it against this country. It would rest in the option of England either to adhere to the old rules of maritime warfare, in a war with the United States, or to maintain the principles of the Declaration of Paris.' The last clause of the Declaration is in these words: 'The present Declaration is not and shall not be binding, except between those powers who have acceded or shall accede to it.'

If a nation, party to the Declaration, is at war with one which is not, the former is not bound to abandon its right to take its enemy's goods from vessels of neutral nations which are parties to the Declaration; and as the stipulation is made, not from any doubt that, as between belligerents only, such captures are the natural and proper results of war, but for the benefit of neutrals vexed thereby, all parties to the Declaration, when they are neutrals, are in danger of losing the benefits of it. If a nation party to the Declaration, being at war with one which is not, is at liberty to disregard the article, neutrals who are parties cannot enforce it by resisting search, or by reprisals, or otherwise. In case of a war between two nations, both being parties to the Declaration, if either disregards it, can the other retaliate? If so, does not he also violate the conventional right of the neutral, a party with him to the Declaration, from whose vessel he takes his enemy's property in the way of retaliation? Does that make a breach of treaty and *casus belli*? If either belligerent violates the rule, and the neutral power, being also party to the treaty, does not resist the act and vindicate its right under the Declaration, does it not give the other belligerent the right to complain, and to seek that summary and rapid redress which the exigencies of war often require or justify?

The assertion of these rights and obligations, and the real or pretended suspicion that the opposite belligerent or a neutral, parties to the convention, do not observe the convention, or insist on its observance, together with the pressure of national exigencies, have been found sufficient, whether as causes or pretexts, to render unavailing all former compacts for the freedom of enemy's goods in neutral vessels. [611] As to the Declaration of Paris, however, it may be said that the number and power of the nations parties to it, with the increase of the influence of commerce, and of capital interested in neutral trade, may be sufficient to sustain it, even if it does not, by the accession of the United States, grow into international law. See the debates on the Declaration of Paris and the agreement of 1854, in the House of Commons, July 4, 1854. (Hansard, cxxxiv. 1098); and in the House of Lords, May 22, 1856 (*Ibid.* cxlii. 482.)

It must not be supposed that the new rule, if adopted, will give neutrals entire exemption from loss and vexation. The right to stop and search will still exist, and in its full force. The belligerent will still have the right to examine into the reality and *bona fides* of the ostensible neutral character of the vessel, and, for that purpose, to make all the investigation he now makes into papers and letters; and not only into those relating to the vessel, but also into those relating to the cargo, and to the destination of the vessel, if likely to throw light upon the ownership. The fraudulent use of a neutral flag and papers by belligerents may be expected to be almost universal, and the examinations will necessarily be strict and searching. And, even if the vessel is clearly neutral, there is still the right of search to ascertain whether the cargo or any of it be contraband of war, involving an inquiry into the actual destination of the vessel and of the cargo, which, if contraband and bound to an enemy's port, will be pretty sure to assume an ostensible neutral destination. And, if there is probable cause to suspect the vessel of being enemy's property, or the cargo of being contraband, [612] with destination to the enemy's country, there will be the right and duty to send her in for adjudication; and a resistance to search, or concealment of facts tending to show the goods to be contraband, will still be cause for condemnation of the vessel. (Mr. Marcy to Mr. Buchanan, April 13, 1854. Speeches of Earl Derby and others in the House of Lords, Hansard's Debates, cxlii. 52.⁽¹⁾) Mr. Marcy, in the conclusion of his note to M. Sartiges, of July 14, 1856, suggests that the Declaration of Paris ought to result in some modification of the law of contraband, which should still further exempt neutrals from the evils of visit and search; and suggests that the

[1 For cxlii. 52 read cxlii. 521.]—G.G.W.

fluctuating usage among nations, and the texts of various conventions designed to give to that usage the fixed form of positive law.²²⁴

laws of siege and blockade, which prohibit all trade with such places, 'afford all the remedies against neutrals that the parties to a war can justly claim.' (See note 226, *infra*, on Contraband of War.)

During the civil war in the United States, the French Government felt uneasy lest France should suffer by reason of the fact, that, under her treaty of 1800, the United States might condemn French goods in rebel vessels, while it would not do so with the goods of other nations with whom the United States had no such treaty. This, no doubt, added a motive for the French to unite with England to arrange the difficulties that lay in the way of the accession of the United States to the Declaration of Paris. Mr. Seward's letter to Mr. Adams of 7th September, 1861, in which he breaks off the negotiations for an accession to the Declaration of Paris, still declares that the United States, in this war, will adopt the policy, 'according to our traditional principles, that Her Majesty's flag covers⁽¹⁾ enemy's goods not contraband of war. Goods of Her Majesty's subjects not contraband of war are exempt from confiscation, though found under a disloyal⁽¹¹⁾ flag.' (Dipl. Corr. 1861, p. 143.) And, in his letter to Mr. Dayton of Sept. 10, 1861, on the same subject, Mr. Seward says, 'We have always practised on the principles of the Declaration. We did so, long before they were adopted by the Congress of Paris, so far as the rights of neutral or friendly States are concerned. While our relations with France remain as they now are, we shall continue the same practice none the less faithfully than if bound to do so by a solemn convention.' (Dipl. Corr. 1861, p. 251.)

The British and French Governments, through their consuls at Charleston, made an arrangement with the Confederacy, by which the Confederates agreed to adopt the third, fourth, and fifth Articles of Paris, but not the first. (British Parl. Papers, North America, No. 3.) And, in his letter to Lord Lyons on the Trent affair, Mr. Seward refers to the fact that the United States had, in this war, made known its intention to act in accordance with the second and third articles of the Declaration of Paris.

Again, Mr. Seward, in a letter to Mr. Hülseman of Aug. 22, 1861, requests him to answer to the questions of Count Rechberg, that the United States, in its relations with Austria, 'does adopt and will⁽¹¹¹⁾ apply the principles thus recited' [the second, third, and fourth Articles of Paris]. (Dipl. Corr. of 1861, p. 191.)

Again, in a letter to Baron Gerolt of July 16, 1861, Mr. Seward, referring to the second and third Articles of Paris, says, 'The undersigned has the pleasure of informing Baron Gerolt, by authority of the President of the United States, that the government cheerfully declares its assent to these principles, in the present case;^(1v) and they will be fully observed by this government in its relations with Prussia.' (Dipl. Corr. 1861, p. 44.)

Indeed, the United States made it known to the commercial powers of Europe, that they were ready and desirous to adopt the second, third, and fourth Articles [613] of Paris; that, although they preferred them with the 'Marcy Amendment,' and without the first article, they were willing to adopt them as they stood. They were repelled, as has been shown (note 173, *ante*) by Great Britain and France insisting on a special restriction clause to meet the case of possible complications with the Confederates. Still, when this negotiation broke off, the United States made known its intention to follow the second, third, and fourth rules of the Declaration, in the war. It has been suggested that the President could not, by following the second Article, vary the law of nations so as to control the decisions of our prize courts. That is true. Those courts could be directed only by a statute of Congress or a treaty, and, in the absence of either, must look solely to the law of nations for their rule in a pending war; but the executive can carry out its foreign policy by instructions to the navy not to capture in such cases, and, if captures should be made, by directing a restitution before adjudication. No case is reported of a condemnation, in opposition to the second or third Articles of Paris, during the civil war.]—D.

[²²⁴ At the end of the author's examination of this subject, at § 501, is a note, No. 226, on Contraband of War.]—D.

[¹ For according to our traditional principles, that Her Majesty's flag covers *read* Her Majesty's flag, according to our traditional principles, covers.]—G.G.W.

[¹¹ For a disloyal *read* a neutral or disloyal.]—G.G.W.

[¹¹¹ For and will *read* and that it will.]—G.G.W.

[^{1v} After case, a clause is omitted.]—G.G.W.

[610] § 477. Grotius, in considering this subject, makes a distinction between those things which are useful only for the purposes of war, those which are not so, and those which are susceptible of indiscriminate use in war and [611] peace. The *first*, he agrees with all other text-writers in prohibiting neutrals from carrying to the enemy, as well as in permitting the *second* to be so carried; the *third* class, such as money, provisions, ships, and naval stores, he sometimes prohibits, and at others permits, according to the existing circumstances of the war.^(a)

Classification of goods as to contraband. Position of Grotius.

[612] § 478. Vattel makes somewhat of a similar distinction, though he includes timber and naval stores among those articles which are particularly useful for the purposes of war, and [613] are always liable to capture as contraband; and considers provisions as such only under certain circumstances, 'when there are hopes of reducing the enemy by famine.'^(a)

Vattel's position on that subject.

§ 479. Bynkershoek strenuously contends against admitting into the list of contraband articles those things which are of promiscuous use in peace and in war. He considers the limitation assigned by Grotius to the right of intercepting them, confining it to the case of necessity, and under the obligation of restitution or indemnification, as insufficient to justify the exercise of the right itself. He concludes that the materials out of which contraband articles may be formed, are not themselves contraband; because if all the materials may be prohibited, out of which something may be fabricated that is fit for war, the catalogue of contraband goods will be almost interminable, since

Position of Bynkershoek on that subject.

(a) 'Sed et quæstio incidere solet quid liceat in eos qui hostes non sunt, aut dici nolunt, sed hostibus res aliquas subministrant. Nam et olim et nuper de eâ re acriter certatum scimus, cum alii belli rigorem, alii commerciorum libertatem defenderent.

'Primum distinguendum inter res ipsas. Sunt enim quæ in bello tantum usum habent, ut arma: sunt quæ in bello nullum habent usum, ut quæ voluptati inserviunt: sunt quæ⁽¹⁾ in bello et extra bellum usum habent, ut pecuniæ, commeatus, naves, et quæ navibus adsunt. In primo genere verum est dictum Amalasuinthæ ad Justinianum, in hostium esse partibus qui ad bellum necessaria hosti administrat. Secundum genus querelam non habet. . . . In tertio illo genere usûs ancipitis distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat. Quod si juris mei executionem rerum subvectio impedierit, idque scire poterit qui advenit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax exspectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri exemit, aut fugam ejus in meam fraudem instruxit: et ad damni dati modum res quoque ejus capi, et dominium earum debiti consequendi causâ quæri poterit. Si damnum nondum dederit sed dare voluerit, jus erit rerum retentione eum cogere ut de futuro caveat obsidibus, pignoribus, aut alio modo. Quod si præterea evidentissima sit hostis mei in me injustitia, et ille eum in bello iniquissimo confirmet, jam non tantum civiliter tenebitur de damno, sed et criminaliter, ut is qui judici imminenti reum manifestum eximit: atque eo nomine licebit in eum statuere quod delicto convenit, secundum ea quæ de poenis diximus, quare intra eum modum etiam spoliari poterit.' Grotius, de Jur. Bel. ac Pac. lib. iii. cap. i, § 5, pp. 1, 2, 3.⁽²⁾

(a) Vattel, Droit des Gens, liv. iii. ch. 7, § 112.

[¹ For quæ in bello read quæ et in bello.]—G.G.W.

[² For pp. 1, 2, 3 read paragraphs 1, 2, 3.]—G.G.W.

there is hardly any kind of material out of which something, at least, fit for war may not be fabricated. The interdiction of so many articles would amount to a total interdiction of commerce, and might as well be so expressed. He qualifies this general position by stating, that it may sometimes happen that materials for building ships are prohibited, 'if the enemy is in great need of them, and cannot well carry on the war without them.' On this ground, he justifies the edict of the States-General of 1657 against the Portuguese, and that of 1652 against the English, as exceptions to the general rule that materials for ship-building are not contraband. He also states that 'provisions are often excepted' from the general freedom of neutral commerce 'when the enemies are besieged by our friends, or are *otherwise* pressed by famine.'^(a)

(a) 'Grotius,⁽¹⁾ in eo argumento occupatus, distinguit inter res, quæ in bello usum [614] habent, et quæ nullum habent, et quæ promiscui usûs sunt, tam in bello, quàm extra bellum. Primum genus non hostes hostibus nostris advehere prohibet, secundum permittit, tertium nunc prohibet, nunc permittit. Si sequamur, quæ *capite præcedenti* disputata sunt, de primo et secundo genere non est, quod magnopere laboremus. In tertio genere distinguit Grotius, et permittit res promiscui usûs interciperi, sed in casu necessitatis, si aliter meaque tueri non possim, et quidem sub onere restitutionis. Verùm, ut alia præteream, quis arbiter erit ejus necessitatis, nam facillimum est eam prætexere? an ipse ego, qui intercepi? Sic, puto, ei sedet, sed in causâ meâ me sedere judicem omnes leges omniaque jura prohibent, nisi quod usus, Tyrannorum omnium princeps, admittat, ubi fœdera inter Principes explicanda sunt. Nec etiam potui animadvertere, mores Gentium hanc Grotii distinctionem probasse; magis probarunt, quod deinde ait, neque obsessis licere res promiscui usûs advehere, sic enim alteri prodessem in necem alterius, ut latius intelliges ex *Capite seq.* Quòd autem ipse ille Grotius tandem addit, distinguendum esse inter belli justitiam et injustitiam, ad Fœderatos, certo casu, pertinere posse, sed ad eos, qui, neutrarum partium sunt, nunquam pertinere *Capite præced.* mihi visus sum probasse.

... 'Ex his fere intelligo, *contrabanda* dici, quæ uti sunt, bello apta esse possunt, nec quicquam interesse, an et extra bellum usum præbeant. Paucissima sunt belli instrumenta, quæ non et extra bellum præbeant usum sui. Enses gestamus ornamenti causâ, gladiis animadvertimus in facinorosos, et ipso pulvere bellico utimur pro oblectamento, et ad testandam publicè lætitiâ, nec tamen dubitamus, quin ea veniant nomine τῶν *contrabande Waren*. De his, quæ promiscui usûs sunt, nullus disputandi esset finis, et nullus quoque, si de necessitate sequamur Grotii sententiam, et varias, quas adjicit, distinctiones. Excute pacta Gentium, quæ diximus, excute et alia, quæ alibi exstant, et reperies, omnia illa appellari *contrabanda*, quæ, uti hostibus suggeruntur, bellis gerendis inserviunt, sive instrumenta bellica sint, sive materia per se bello apta: nam quod Ordines Generales 6 Maj. 1667, contra Suecos decreverunt, etiam materiam, bello non aptam, sed quæ facillè bello aptari possit, pro *contrabanda* esse habendam, singularem rationem habebat, ex jure nempe retorsionis, ut ipsi Ordines in eo decreto significant.

'Atque inde judicabis, an ipsa materia rerum prohibitarum quoque sit prohibita? Et in eam sententiam, si quid tamen definiat, proclivior esse videtur Zoucheus, *de jure Fœciali*, Part II. sect. vii.⁽²⁾ Q. 8. Ego non essem, quia ratio et exempla me moveant in contrarium. Si omnem materiam prohibeas, ex quâ quid bello aptari possit, ingens esset catalogus rerum prohibitarum, quia nulla fere materia est, ex quâ non saltem aliquid, bello aptum, facillè fabricemus. Hâc interdictâ, tantum non omni commercio interdicimus, quod valde esset inutile. Et § 4, Pacti 1 Dec., 1674, inter Carolum II., Angliæ Reg. et Ordines Generales; et § 4, Pacti 26 Nov., 1675, inter Regem Suecorum et Ordines Generales; et § 16, Pacti 12 Oct., 1679, inter eosdem, amicos hostibus quibus arma non licet, permittunt advehere ferrum, æs, metallum, materiam navium, omnia denique, quæ ad usum belli parata non sunt. Quandoque

[¹ For Grotius read Grotius . . .]—G.G.W.

[² For vii read viii.]—G.G.W.

[614] Valin and Pothier both concur in declaring that provisions (*munitions de bouche*) are not contraband by the prize law of [615] France, or the common law of nations, unless in the single case where they are destined to a besieged or blockaded place.^(b)

§ 480. Valin, in his commentary upon the marine ordinance of Louis XIV., by which only munitions of war were declared to be contraband, says:—'In the war of 1700, pitch and tar were comprehended in the list of contraband, because the enemy treated them as such, except when found on board Swedish ships, these articles being of the growth and produce of their country. In the treaty of commerce concluded with the King of Denmark, by France, the 23d of August, 1742, pitch and tar were also declared contraband, together with resin, sail-cloth, hemp and cordage, masts, and ship-timber. Thus, as to this matter, there is no fault to be found with the conduct of the English, except where it contravenes particular treaties; for in law these things are now contraband, and have been so since the beginning of the present century, which was not the case formerly, as it appears by ancient treaties, and particularly that of St. Germain, concluded with England in 1677; the fourth article of which expressly provides that the trade in all these articles shall remain free, as well as in every thing necessary to human nourishment, with the exception of places besieged or blockaded.'^(a)

§ 481. In the famous case of the Swedish convoy, determined in the English Court of Admiralty, in 1799, Sir W. Scott (Lord Stowell) states, 'that tar, pitch, and hemp, going to the enemy's use, are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a *disputable nature*, and perhaps continued so at the time of making that treaty,' (that is, the treaty of 1661, between Great Britain and Sweden, which was still in force when he was pronouncing this judgment,) 'or at least at the time of making *that* treaty which is the basis of it, I mean the treaty in which Whitlock was employed in 1656⁽¹⁾;

Decision of Sir W. Scott, as to naval stores under the Swedish treaty of 1780.

tamen accidit, ut et navium materia prohibeatur, si hostis eâ quàm maxime indigeat, et absque eâ commode bellum gerere haud possit. Quum Ordines Generales, in § 2, edicti contra Lysitanos, 31 Dec., 1657, iis, quæ communi Populorum usu *contrabanda* censentur, Lysitanos juvari vetuissent, specialiter addunt in § 3, ejusdem edicti, quia nihil nisi mari a Lysitanis metuebant, ne quis etiam navium materiam iis advehere vellet, palam sic navium materia a *contrabandis* distincta sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum instrumentis belli in [615] § 2, edicti contra Anglos, 5 Dec., 1652, et in edicto Ordinum Generalium contra Francos, 9 Mart., 1689. Sed sunt hæ exceptiones, quæ regulam confirmant.' Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10.

(b) Valin, Comm. sur l'Ordonn. liv. iii. tit. 9. Des Prises, art. 11. Pothier, de Propriété, No. 104.

(a) Valin, Comm. sur l'Ordonn. liv. iii. tit. 9. Des Prises, art. 11.

[¹ For in 1656 read in the year 1656.]—G.G.W.

for I conceive that Valin expresses the truth of this matter when he says: "*De droit ces [616] choses,*" (speaking of naval stores,) "*sont de contrabande aujourd'hui et depuis le commencement de ce siècle, ce qui n'étoit pas autrefois néanmoins;*"—and Vattel, the best recent writer upon these matters, explicitly admits amongst positive contraband, "*les bois, et tout ce qui sert à la construction et à l'armement de vaisseaux de guerre.*" Upon this principle was founded the modern explanatory article of the Danish treaty, entered into in 1780, on the part of Great Britain by a noble lord (Mansfield) then Secretary of State, whose attention had been peculiarly turned to subjects of this nature. I am, therefore, of opinion, that, although it might be shewn that the nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and therefore a discreet silence concerning them was observed in the⁽ⁱ⁾ composition of that treaty, and of the latter treaty derived from it, yet that the exposition which the later judgment and practice of Europe had⁽ⁱⁱ⁾ given upon this subject would, in some degree, affect and supply⁽ⁱⁱⁱ⁾ what the treaties had been content to leave on that indefinite and disputable footing, on which the notions then more generally prevailing in Europe had placed it.^(a)

The decision
in the *Maria*,
criticised.

§ 482. It seems difficult to read the treaties of 1656 and 1661, between Great Britain and Sweden, as fairly admitting the interpretation placed upon them in the above cited judgment. These treaties, together with those subsequently concluded between the same powers in 1664 and 1665, all enumerate coined money, provisions, and munitions of war, as contraband between the contracting parties; and the *discreet silence* referred to by Lord Stowell is sufficiently supplied by the treaties of 1664 and 1665, which expressly declared, that 'where one of the parties shall find itself at war, commerce and navigation shall be free for the subjects of that power which shall not have taken any part in it with the enemies of the other; and that they shall, consequently, be at liberty to carry to them directly all the articles which are not specially excepted by the 11th article of the treaty concluded at London in 1661, nor by virtue of this same article expressly declared prohibited or contraband, or which are not enemy's property.' The following article is still more explicit: 'And to the end that it may be known to all those who [617] shall read these presents, what are the goods especially excepted and prohibited, or regarded as contraband, it has appeared fit to enumerate them here according to the aforesaid 11th article of the treaty of London. These goods specially designated

(a) The *Maria*, Robinson's Adm. Rep. i. 372.^(iv)

[ⁱ For and therefore a discreet silence concerning them was observed in the *read* and that therefore a discreet silence was observed respecting them in the.]—G.G.W.

[ⁱⁱ For had *read* has.]—G.G.W.

[^{iv} For 372 *read* 371 a.]—G.G.W.

[ⁱⁱⁱ For supply *read* apply.]—G.G.W.

are the following,' &c. Here follows the enumeration, as in the 11th article, which makes no mention of naval stores.^(a)

§ 483. This view seems to be confirmed by the opinion given, in 1674, by Sir Leoline Jenkins, to King Charles II., in the case of a cargo of naval stores, the produce of Sweden, 'belonging to an English subject, taken on board a Swedish vessel, and carried into Ostend by a Spanish privateer. 'There is not any pretence to make the pitch and tar belonging to your Majesty's subjects to be contraband; these commodities not being⁽ⁱ⁾ enumerated in the 24th article of the treaty made between your Majesty and the crown of Spain, in the year 1667, are consequently declared not to be contraband in the article next following. The single objection that seems to lie against the petitioner in this case is, that this tar and pitch is found laden, not in an English, but a Swedish bottom, as by the proofs and documents on board it doth appear; and, consequently, that the benefit of those articles in the Spanish treaty cannot be claimed here, since they are in favor of our trade in those commodities that shall be found laden in our own, not in foreign bottoms. But it is not probable that Sweden hath suffered or allowed, in any treaty of theirs with Spain, that their own native commodities, pitch and tar, should be reputed contraband. These goods, therefore, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other law than by the general law of nations; and then I am humbly of opinion, that nothing ought to be judged contraband by that law in this case,⁽ⁱⁱ⁾ except it be in the case of besieged places, or of a general notification made by Spain to all the world, that they will condemn all the pitch and tar they meet with. So that, upon the whole, your Majesty's gracious intercession for, and protection to the petitioner in his claim, will be founded, not upon the equity and the true meaning of your Majesty's treaty with Spain, but upon the general law and practice of all nations.'^(a)

Opinion of Sir Leoline Jenkins, as to naval stores.

[618] § 484. By the treaty of navigation and commerce of Utrecht, between Great Britain and France, renewed and confirmed by the treaty of Aix-la-Chapelle, in 1748, by the treaty of Paris, in 1763, by that of Versailles, in 1783, and by the commercial treaty between France and Great Britain, of 1786, the list of contraband is strictly confined to munitions of war; and naval stores, provisions, and all other goods which have not been worked into the form of any instrument or furniture for warlike use, by land or by sea, are expressly excluded from this list.

The English-French treaties in the 18th century, as to naval stores and provisions.

§ 485. The subject of the contraband character of naval stores

England and the Bal-

(a) Schlegel, *Examen de la Sentence prononcée par le tribunal d'Amirauté Anglaise*, le 11 Juin 1799, dans l'affaire du convoi Suédois, p. 125.

(a) *Life and Correspondence of Sir L. Jenkins*, ii. 751.

[¹ For not being read being not.]—G.G.W.

[¹¹ After case, a clause is omitted.]—G.G.W.

tic powers, continued a vexed question between Great Britain and the Baltic
as to naval powers, throughout the whole of the eighteenth century. Various
stores and provisions. relaxations of the extreme belligerent pretensions on this subject had
been conceded in favor of the commerce, in articles the peculiar growth
and production of these States, either by permitting them to be freely
carried to the enemy's ports, or by mitigating the original penalty of
confiscation, on their seizure, to the milder right of preventing the
goods being carried to the enemy, and applying them to the use of the
belligerent, on making a pecuniary compensation to the neutral owner.
This controversy was at last terminated by the convention between
Great Britain and Russia, concluded in 1801, to which Denmark and
Sweden subsequently acceded. By the 3d article of this treaty it is
declared, 'That, in order to avoid all ambiguity in what ought to be
considered as contraband of war, His Imperial Majesty of all the
Russias and His Britannic Majesty declare, conformably to the 11th
article of the treaty of commerce, concluded between the two crowns
on the 10th (21st) February, 1797, that they acknowledge as such only
the following articles, namely, cannons, mortars, fire-arms, pistols,
bombs, grenades, balls, bullets, firelocks, flints, matches, powder, salt-
petre, sulphur, helmets, pikes, swords, sword-belts, saddles and bridles;
excepting, however, the quantity of the said articles which may be
necessary for the defence of the ship and of those who compose the
crew; and all other articles whatever, not enumerated here, shall not
be considered warlike and naval ammunition, nor be subject to con-
fiscation, and of course shall pass freely, without being subject to the
smallest difficulty, unless they be considered as enemy's property in the
above settled [619] sense. It is also agreed, that what is stipulated in
the present article shall not be to the prejudice of the particular
stipulations of one or the other crown with other powers, by which
objects of a similar kind should be reserved, provided, or permitted.'

The treaty
of 1801, on
the subject.

§ 486. The object of this convention is declared, in its preamble,
to be the settlement of the differences between the contracting parties,
which had grown out of the armed neutrality, by 'an invariable deter-
mination of their principles upon the rights of neutrality, in their
application to their respective monarchies;' which object was accom-
plished by the northern powers yielding the rule of *free ships free goods*,
whilst Great Britain conceded the points asserted by them as to contra-
band, blockades, and the coasting and colonial trade.

The 8th article of the treaty also declared, that 'the principles and
measures adopted by the present act, shall be alike applicable to all the
maritime wars in which one of the two powers may be engaged, whilst
the other remains neutral. These stipulations shall consequently be
regarded as permanent, and shall serve for a constant rule to the con-
tracting powers, in matters of commerce and navigation.'

§ 487. The list of contraband, contained in the convention between Great Britain and Russia, to which Sweden acceded, differed, in some respects, from that contained in the 11th article of the treaty of 1661, between Great Britain and Sweden. In order to prevent a recurrence of the disputes which had arisen relative to that article, a convention was concluded at London, between these two powers, on the 25th of July, 1803, by which the list of contraband, contained in the convention between Great Britain and Russia, was augmented, with the addition of the articles of coined money, horses, and the necessary equipments of cavalry, ships of war, and all manufactured articles, serving immediately for their equipment, all which articles were subjected to confiscation. It was further stipulated, that all naval stores, the produce of either country, should be subject to the right of pre-emption by the belligerent party, upon condition of paying an indemnity of ten per centum upon the invoice price or current value, with demurrage and expenses. If bound to a neutral port, and detained upon suspicion of being bound to an enemy's port, the vessels detained were to receive an indemnity, unless the belligerent government chose to exercise the right of [620] pre-emption; in which case, the owners were to be entitled to receive the price which the goods would have sold for at their destined port, with demurrage and expenses.(a)

The English-Swedish treaty of 1803, on the subject.

§ 488. The doctrine of the British Prize Courts, as to provisions and naval stores becoming contraband, independently of special treaty stipulations, is laid down very fully by Sir W. Scott, in the case of *The Jonge Margaretha*. He there states that the catalogue of contraband had varied very much, and sometimes in such a manner as to make it difficult to assign the reason of the variations, owing to particular circumstances, the history of which had not accompanied the history of the decisions. ⁽¹⁾“In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted, by a person of great knowledge and experience in the English admiralty, that, by its practice, *corn, wine, and oil*, were liable to be deemed contraband. In much later times, many sorts of provisions, such as butter, salted fish, and rice, have been condemned as contraband. The modern established rule was, that generally they are not contraband, but may become so under circumstances arising out of the peculiar situation of the war, or the condition of the parties engaged in it. Among the causes which tend to prevent provisions from being treated as contraband, one is, that they are of the growth of the country which exports them. Another circumstance, to which some indulgence by the practice of nations is shown, is when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence,

Sir W. Scott, as to articles *ancipitius usús*. *The Jonge Margaretha*. Provisions and naval stores, when contraband.

(a) Martens, Recueil, tom. vii. pp. 150-281.

[¹ This is not an exact quotation from the decision.]—G.G.W.

though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favorably considered than cordage; and wheat is not considered so noxious a commodity as any of the final preparations of it for human use. But the most important distinction is, whether the articles are destined for the ordinary uses of life, or for military use. The nature and quality of the port to which the articles were going, is a test of the matter of fact to which the distinction is to be applied. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the [621] great predominant character of a port be that of a port of naval equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final application of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.'(a)

The same
subject. The
Charlotte.

§ 489. The distinction, under which articles of promiscuous use are considered as contraband, when destined to a port of naval equipment, appears to have been subsequently abandoned by Sir W. Scott. In the case of *The Charlotte*, he states that 'the character of the port is immaterial; since naval stores, if they are to be considered as contraband, are so without reference to the nature of the port, and equally, whether bound to a mercantile port only, or to a port of naval military equipment. The consequence of the supply may be nearly the same in either case. If sent to a mercantile port, they may then be applied to immediate use in the equipment of privateers, or they may be conveyed from the mercantile to the naval port, and there become subservient to every purpose to which they could have been applied if going directly to a port of naval equipment.'⁽¹⁾(a)²²⁵

British in-
structions of
1793, as to
provisions.

§ 490. The doctrine of the English Courts of Admiralty, as to provisions becoming contraband under certain circumstances of war, was adopted by the British government in the instructions given to

(a) *The Jonge Margaretha*, Rob. i. 192.

(a) *Robinson's Adm. Rep. v. 305.*

[²²⁵ But this decision is not an abandonment of the rule laid down in the *Jonge Margaretha*. The cargo of the *Charlotte* was large masts and spars in a manufactured state, which, it was contended, were contraband *per se*. On the authority of the *Graafen von*⁽¹¹⁾ *Gothland*, Lord Stowell held that this cargo was of such a character as to be contraband, if destined to a place where hostile vessels may be fitted out or supplied.]—D.

[¹ This is not an exact quotation from the decision in *The Charlotte*.]—G.G.W.

[¹¹ For *Graafen von* read *Graeffen van*.]—G.G.W.

their cruisers on the 8th June, 1793, directing them to stop all vessels laden wholly or in part with corn, flour, or meal, bound to any port in France, and to send them into a British port, to be purchased by government, or [622] to be released, on condition that the master should give security to dispose of his cargo in the ports of some country in amity with His Britannic Majesty. This order was justified, upon the ground that, by the modern law of nations, all provisions are to be considered contraband, and, as such, liable to confiscation, wherever the depriving an enemy of these supplies is one of the means intended to be employed for reducing him to terms. The actual situation of France (it was said) was notoriously such, as to lead to the employing this mode of distressing her by the joint operations of the different powers engaged in the war; and the reasoning which the text-writers apply to all cases of this sort, was more applicable to the present case, in which the distress resulted from the unusual mode of war adopted by the enemy himself, in having armed almost the whole laboring class of the French nation, for the purpose of commencing and supporting hostilities against almost all European governments; but this reasoning was most of all applicable to a trade, which was in a great measure carried on by the then actual rulers of France, and was no longer to be regarded as a mercantile speculation of individuals, but as an immediate operation of the very persons who had declared war, and were then carrying it on against Great Britain.(a)

§ 491. This reasoning was resisted by the neutral powers, Sweden, Denmark, and especially the United States. The American government insisted, that when two nations go to war, other nations, who choose to remain at peace, retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry for exchange to all countries, belligerent or neutral, as usual; to go and come freely, without injury or molestation; in short, that the war among others should be, for neutral nations, as if it did not exist. The only restriction to this general freedom of commerce, which has been submitted to by nations at peace, was that of not furnishing to either party implements merely of war, nor any thing whatever to a place blockaded by its enemy. These implements of war had been so often enumerated in treaties under the name of contraband, as to leave little question about them at that day. It was sufficient to say, that corn, flour, and meal, were not of the class of contraband, [623] and consequently remained articles of free commerce. The state of war then existing between Great Britain and France furnished no legitimate right to either of these belligerent powers to

The doctrine of these instructions denied by the neutral powers.

(a) Mr. Hammond's Letter to Mr. Jefferson, 12th September, 1793: Waite's⁽¹⁾ State Papers, i. 398.

[¹ For Waite's *read* Wait's.]—G.G.W.

interrupt the agriculture of the United States, or the peaceable exchange of their produce with all nations. If any nation whatever had the right to shut against their produce all the ports of the earth except her own, and those of her friends, she might shut these also, and thus prevent altogether the export of that produce.^(a)

The United States-British treaty of 1794, as to naval stores and provisions.

§ 492. In the treaty subsequently concluded between Great Britain and the United States, on the 19th November, 1794, it was stipulated, (article 18,) that under the denomination of contraband should be comprised all arms and implements serving for the purposes of war, 'and also timber for ship-building, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted.' The article then goes on to provide, that, '*whereas the difficulty of agreeing on the precise cases, in which alone provisions and other articles, not generally contraband, may be regarded as such,* renders it expedient to provide against the inconveniences and misunderstandings which might thence arise; it is further agreed, that whenever any such articles, so becoming contraband according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated; but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the government under whose authority they act, shall pay to the masters or owners of such vessels the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention.'

The British Order in Council of April, 1795, as to provisions.

§ 493. The instructions of June, 1793, had been revoked previous to the signature of this treaty; but, before its ratification, the British government issued, in April, 1795, an Order in Council, instructing its cruisers to stop and detain all vessels, laden wholly or in part with corn, flour, meal, and other articles of provisions, and bound to any port in France, and to send them to such ports as might be most [624] convenient, in order that such corn, &c., might be purchased on behalf of government.

Discussion of the legality of this order.

§ 494. This last order was subsequently revoked, and the question of its legality became the subject of discussion before the mixed commission, constituted under the treaty to decide upon the claims of American citizens, by reason of irregular or illegal captures and condemnations of their vessels and other property, under the authority of the British government. The Order in Council was justified upon two grounds:—

1. That it was made when there was a prospect of reducing the

(a) Mr. Jefferson's Letter to Mr. Pinkney,⁽¹⁾ 7th September, 1793: Waite's⁽¹¹⁾ State Papers, i. 393.

[¹ For Pinkney read Pinckney.]—G.G.W.

[¹¹ For Waite's read Wait's.]—G.G.W.

enemy to terms by famine, and that, in such a state of things, provisions bound to the ports of the enemy became so far contraband, as to justify Great Britain in seizing them upon the terms of paying the invoice price, with a reasonable mercantile profit thereon, together with freight and demurrage.

2. That the order was justified by *necessity*; the British nation being at that time threatened with a scarcity of the articles directed to be seized.

The first of these positions was rested not only upon the general law of nations, but upon the above quoted article of the treaty between Great Britain and America.

§ 495. The evidence adduced of this supposed law of nations was principally the following passage of Vattel:—‘Commodities particularly useful in war, and the carrying of which to an enemy is prohibited, are called contraband goods. Such are arms, ammunition, timber for ship-building, every kind of naval stores, horses, and even provisions, in certain junctures, when we have hopes of reducing the enemy by famine.’^(a)

This discussion continued. Vattel's opinion.

In answer to this authority, it was stated that it might be sufficient to say that it was, at best, equivocal and indefinite, as it did not designate what the junctures are in which it might be held, that ‘there are hopes of reducing the enemy by famine;’ that it was entirely consistent with it to affirm, that these hopes must be built upon an obvious and palpable chance of effecting the enemy’s reduction by this obnoxious mode of warfare, and that no such chance is by the law of nations admitted to exist, except in certain defined cases; such as the actual siege, blockade, or investment of [625] particular places. This answer would be rendered still more satisfactory, by comparing the above quoted passage with the more precise opinions of other respectable writers on international law, by which might be discovered that which Vattel does not profess to explain—the combination of circumstances to which his principle is applicable, or is intended to be applied.

But there was no necessity for relying wholly on this answer, since Vattel would himself furnish a pretty accurate commentary on the vague text which he had given. The only instance put by this writer, which came within the range of his general principle, was that which he, as well as Grotius, had taken from Plutarch. ‘Demetrius,’ as Grotius expressed it, ‘held Attica by the sword. He had taken the town of Rhamnus, *designing a famine in Athens*, and had almost accomplished his design, when a vessel laden with provisions attempted to relieve the city.’ Vattel speaks of this as of a case in which provisions were contraband, (section 17,) and although he did not make use of this example for the declared purpose of rendering more specific the passage above

(a) Droit des Gens, liv. iii. ch. 7, § 112.

cited, yet as he mentions none other to which it can relate, it is strong evidence to show that he did not mean to carry the doctrine of special contraband further than that example would warrant.

It was also to be observed that, in section 113, he states expressly that all contraband goods, (including, of course, those becoming so by reason of the junctures of which he had been speaking at the end of section 112,) are to be confiscated. But nobody pretended that Great Britain could rightfully have *confiscated* the cargoes taken under the order of 1795; and yet if the seizures made under that order fell within the opinion expressed by Vattel, the confiscation of the cargoes seized would have been justifiable. It had long been settled, that all contraband goods are subject to forfeiture by the law of nations, whether they are so in their own nature, or become so by existing circumstances; and even in early times, when this rule was not so well established, we find that those nations who sought an exemption from forfeiture, never claimed it upon grounds peculiar to any description of contraband, but upon general reasons, embracing all cases of contraband whatsoever. As it was admitted, then, that the cargoes in question were not subject to forfeiture as contraband, it was manifest that the juncture which gave birth to the Order in Council [626] could not have been such a one as Vattel had in view; or, in other words, that the cargoes were not become contraband at all within the true meaning of his principle, or within any principle known to the general law of nations.

This discussion
continued.
Opinion of
Grotius.

§ 496. The authority of Grotius was also adduced, as countenancing this position.

Grotius divides commodities into three classes, the first of which he declares to be plainly contraband; the second plainly not so; and as to the third, he says:—"In tertio illo genere usûs ancipitis, distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat." This 'causa alia' is afterwards explained by an example, 'ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur.'

This opinion of Grotius, as to the third class of goods, did not appear to proceed at all upon the notion of contraband, but simply upon that of a pure necessity on the part of the capturing belligerent. He does not consider the right of seizure as a means of effecting the reduction of the enemy, but as the indispensable means of our own defence. He does not state the seizure upon any supposed illegal conduct in the neutral, in attempting to carry articles of the third class, (among which provisions are included,) *not bound to a port besieged or blockaded*, to be lawful, when made with the mere view of annoying or reducing the enemy, but solely when made with a view to our own preservation or defence, under the pressure of that imperious and

unequivocal necessity, which breaks down the distinctions of property, and, upon certain conditions, revives the original right of using things as if they were in common.

This necessity he explains at large in his second book, (cap. ii. sec. 6,) and, in the above recited passage, he refers expressly to that explanation. In sections 7, 8, and 9, he lays down the conditions annexed to this right of necessity: as, 1. It shall not be exercised until all other possible means have been used; 2. Nor if the right owner is under a like necessity; and, 3. Restitution shall be made as soon as practicable.

In his third book, (cap. xvii. sec. 1,) recapitulating what he had before said on this subject, Grotius further explains this doctrine of necessity, and most explicitly confirms the construction placed [627] upon the above cited texts. And Rutherford, in commenting on Grotius, (lib. iii. cap. 1, sec. 5,) also explains what he there says of the right of seizing provisions upon the ground of necessity; and supposes his meaning to be that the seizure would not be justifiable in that view, 'unless the exigency of affairs is such, that we cannot possibly do without them.'^(a)

§ 497. Bynkershoek also confines the right of seizing goods, not generally contraband of war, (and provisions among the rest,) to the above-mentioned cases.^(a)

This discussion continued. Opinion of Bynkershoek.

It appeared, then, that so far as the authority of text-writers could influence the question, the Order in Council of 1795 could not be rested upon any just notion of contraband; nor could it, in that view, be justified by the reason of the thing or the approved usage of nations.

§ 498. If the mere hope, however apparently well founded, of annoying or reducing an enemy, by intercepting the commerce of neutrals in articles of provision, (which, in themselves, are no more contraband than ordinary merchandise,) to ports not besieged or blockaded, would authorize that interruption, it would follow that a belligerent might at any time prevent, without a siege or blockade, all trade whatsoever with its enemy; since there is at all times reason to believe that a nation, having little or no shipping of its own, might be so materially distressed by preventing all other nations from trading with it, that such prevention might be a powerful instrument in bringing it to terms. The principle is so wide in its nature, that it is, in this respect, incapable of any boundary. There is no solid distinction, in this view of the principle, between provisions and a thousand other articles. Men must be clothed as well as fed; and even the privation of the conveniences of life is severely felt by those to whom habit has rendered them necessary. A nation, in proportion as it can be debarred

This discussion continued. General principles.

(a) Rutherford's Inst. vol. ii. b. ii. ch. 9, § 19.

(a) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 6.

its accustomed commercial intercourse with other States, must be enfeebled and impoverished; and if it is allowable to a belligerent to violate the freedom of neutral commerce, in respect to any one article not contraband *in se*, upon the expectation of annoying the enemy, or bringing him to terms by a seizure of that article, and preventing it reaching his ports, why not, upon the same expectation of annoyance, cut off as far as [628] possible by captures, all communication with the enemy, and thus strike at once effectually at his power and resources?

This discussion continued. The United States-British treaty of 1794.

§ 499. As to the 18th article of the treaty of 1794, between the United States and Great Britain, it manifestly intended to leave the question where it found it; the two contracting parties, not being able to agree upon a definition of the cases in which provisions and other articles, not generally contraband, might be regarded as such, (the American government insisting on confining it to articles destined to a place actually besieged, blockaded, or invested, whilst the British government maintained that it ought to be extended to all cases where there is an expectation of reducing the enemy by famine,) concurred in stipulating, that 'whenever any such articles, so becoming contraband, *according to the existing law of nations*, shall for that reason be seized, the same shall not be confiscated,' but the owners should be completely indemnified in the manner provided for in the article. When the law of nations existing at the time the case arises pronounces the articles contraband, they may for that reason be seized; when otherwise, they may not be seized. Each party was thus left as free as the other to decide whether the law of nations, in the given case, pronounced them contraband or not, and neither was obliged to be governed by the opinion of the other. If one party, on a false pretext of being authorized by the law of nations, made a seizure, the other was at full liberty to contest it, to appeal to that law, and, if he thought fit, to resort to reprisals and war.

This discussion continued. The justification of necessity considered.

§ 500. As to the second ground upon which the Order in Council was justified, *necessity*, Great Britain being, as alleged at the time of issuing it, threatened with a scarcity of those articles directed to be seized, it was answered that it would not be denied that extreme necessity might justify such a measure. It was only important to ascertain whether that necessity then existed, and upon what terms the right it communicated might be carried into exercise.

Grotius, and the other text-writers on the subject, concurred in stating that the necessity must be real and pressing; and that even then it does not confer a right of appropriating the goods of others, until all other practicable means of relief have been tried and found inadequate. It was not to be doubted that there were other practicable means of averting the calamity apprehended by [629] Great Britain. The offer of an advantageous market in the different ports of the

kingdom, was an obvious expedient for drawing into them the produce of other nations. Merchants do not require to be forced into a profitable commerce; they will send their cargoes where interest invites; and if this inducement is held out to them in time, it will always produce the effect intended. But so long as Great Britain offered less for the necessaries of life than could have been obtained from her enemy, was it not to be expected that neutral vessels should seek the ports of that enemy, and pass by her own? Could it be said that, under the mere apprehension (not under the actual experience) of scarcity, she was authorized to have recourse to the forcible means of seizing provisions belonging to neutrals, without attempting those means of supply which were consistent with the rights of others, and which were not incompatible with the exigency? After this order had been issued and carried into execution, the British government did what it should have done before; it offered a bounty upon the importation of the articles of which it was in want. The consequence was, that neutrals came with these articles, until at length the market was found to be overstocked. The same arrangement, had it been made at an earlier period, would have rendered wholly useless the order of 1795.

§ 501. Upon these grounds, a full indemnification was allowed by the commissioners, under the seventh article of the treaty of 1794, to the owners of the vessels and cargoes seized under the Orders in Council, as well for the loss of a market as for the other consequences of their detention.^(a)²²⁶

Decision of
the Mixed
Commission
against the
Order of
1794.

(a) Proceedings of the Board of Commissioners under the seventh article of the treaty of 1794. MS. Opinion of Mr. W. Pinkney,⁽¹⁾ case of the *Neptune*.

^[226] *Contraband of War*.—The position of the subject of contraband cannot be said to have been much changed since the text was written; still, some light has been thrown upon it by the discussions of later writers.

There seems to have been a concurrence of opinion on one point, that certain things are of such a nature as to be conclusively deemed contraband, so that no further inquiry need be made by prize courts. These courts must act summarily, by sharp and clear lines, and often upon absolute presumptions. It is agreed that they must do so as to contraband. The only difference seems to be one of detail, as to what things do or do not come into this category. The test is variously described, and more or less strictly; but it seems to amount to this,—*Is the primary and ordinary use of the article military, when in the enemy's possession in time of war?* No article is exclusively of military use. Fire-arms are used in time of peace for police purposes, for killing game, for private defence, for salutes, for signal-guns; and mortars and shells, for the humane object of communicating with wrecked vessels: and [630] powder is used for blasting rocks to construct buildings of peace and benevolence. The question is,—what is the primary and ordinary use of such things, in time of war, when in the enemy's possession? It is agreed that all forms of fire-arms, swords, powder and ball, come within this category. It is a question of detail, after the test is agreed upon, what other articles come under it.

There are things, on the other hand, as to which it is impossible even to imagine a direct military purpose; as, a cargo of piano-fortes, works of fine art, and a library of books of theology or *belles-lettres*.

The principal point in dispute is as to articles admitted to be of ambiguous or uncertain use, when in the enemy's country and in time of war. The best illustration of this class is, perhaps, manufactured spars fully ready to be put into ships; and, in later times, marine

[¹ For Pinkney read Pinckney.]—G.G.W.

Transportation of military persons and despatches in the enemy's service.

[630] § 502. Of the same nature with the carrying of contraband goods is the transportation of military persons or despatches in the service of the enemy.²²⁷

steam-machinery, in like condition of readiness. One class of writers contends for an absolute rule as to all articles of such descriptions; so that, if, upon the application of the general test, they are left *ancipitis usus*, they must be free, and no further inquiry can be made for the purpose of ascertaining their probable use in the particular case. Another class of writers contends, that, as to such articles, inquiry may be made into the circumstances, for the purpose of determining their probable use in the particular instance. This is really the point of difference, on principle, among the later writers. The latter rule has been unquestionably the British doctrine, enforced by her Orders in Council and prize courts, recognized in her treaties, and sustained by her statesmen and text-writers. (Reddie on Marit. Intern. Law, ii. 456. Phillimore's Intern. Law, iii. 245-284.^[1] Wildman's Intern. Law, ii. 210 *et seq.* Manning's Law of Nations, 282 *et seq.* Moseley on Contraband, *passim*.) It may also be said, in the main, to have been the American doctrine. The treaty of 1794 with Great Britain recognizes that articles *ancipitis usus* may be contraband, by the then existing law of nations. But our other treaties usually exclude naval stores *ancipitis usus* from the list of contraband, although some of the treaties include saltpetre and sulphur. The treaties with Colombia of 1824, with Venezuela of 1836, with Guatemala of 1849, with New Grenada of 1848,^[11] with San Salvador of 1850, with Mexico of 1851,^[111] enumerate only articles of direct and primary military use. The treaty with Mexico includes provisions destined to a besieged port. In the Commerce (Wheaton's Rep. i. 322),^[17] barley and oats were held contraband in a neutral vessel bound to a neutral port, but destined not for the market, but to be delivered on board the enemy's fleet lying in the port. Kent says, that, as to articles *ancipitis usus*, the inquiry is, 'whether they are'^[v] intended for the ordinary uses'^[vi] of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. The nature and quality of the port to which they'^[vii] are going, is not an irrational test.^[viii] As it is impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces the final use from the immediate destination.' (Comm. i. 140.) Halleck gives the history and practice on the subject, and considers the English and American practice to authorize inquiry [631] into the probable use of articles *ancipitis usus*. He states the arguments against the doctrine by the continental writers, but gives no opinion as to which would be, in his judgment, the better rule. (Intern. Law, 569-591.) Dr. Woolsey (§§ 180, 181) comes to the conclusion that articles *ancipitis usus* should be deemed free, and that the rule of English and American prize courts to the contrary has not been so accepted as to be a part of the settled law of nations. He says, 'If it be doubtful whether an article pertains to the class of contraband or not, the penalty attached to this class of articles ought certainly not to be levied upon it. It is either contraband or not; and is not so, if there is a doubt to what class it belongs.' This is true, but does not meet the question. The question is not, whether there shall be condemnation in a case of doubt, but whether, to solve the doubt, the court is limited to an inspection of the physical nature of the articles, or may inquire further. Professor Parsons (Marit. Law, ii. 93, 94, Boston, 1859) thus defines contraband as settled, in his judgment, by the practice of maritime nations: 'A trade with a belligerent, intended to provide him with military supplies, equipments, instruments, or arms. Goods are contraband which are in fact munitions of war, or may certainly become so, or which are designed, or capable of being used, for the support or assistance of an enemy in carrying on war, offensively or defensively. Thus, even provisions, if they are intended to be sent to a place which an enemy is attempting to reduce by starvation, and, in general, articles ordinarily used only for peaceful purposes, if capable of a military use, and sent to places where it is probable that such a use will be made of them, are contraband of war; and so is all property destined to a besieged or blockaded town.'

[²²⁷ This subject is examined in the note 228, *infra*, on Carrying Hostile Persons and Papers.]—D.

[¹ For iii. 245-284 read iii. secs. 245-248.]—G.G.W.

[¹¹¹ For 1851 read 1831.]—G.G.W.

[^v For they are read the articles were.]—G.G.W.

[^{vi} For uses read use.]—G.G.W.

[^{viii} After test. two sentences are omitted.]—G.G.W.

[¹¹ For 1848 read 1846.]—G.G.W.

[¹⁷ For 322 read 382.]—G.G.W.

[^{vii} For they read the articles.]—G.G.W.

A neutral vessel, which is used as a transport for the enemy's forces, is subject to confiscation, if captured by [631] the opposite

Of the continental writers, Hautefeuille contends for the absolute rule limiting contraband to such articles as are in their nature of first necessity for war, substantially exclusively military in their use, and so made up as to be capable of direct and immediate use in war. (Tit. 8, § 2, tom. ii. pp. 84, 101, 154, 412; tom. iii. p. 222.) Ortolan is of the same opinion, on principle, and contends that all modern treaties limit contraband to articles directly and solely applicable to war; yet he admits that certain articles not actually munitions of war, but whose usefulness is chiefly in war, may, under circumstances, be contraband; as, sulphur, saltpetre, marine steam-machinery, &c.: but coal, he contends, from its general necessity, is always free. (Tom. ii. ch. 6, pp. 179-206.) Massé (Droit Comm. i. 209-211) admits that the circumstances may determine whether articles doubtful in their nature are contraband in the particular case; as, the character of the port of destination, the quantity of goods, and the necessities and character of the war. The same view is held by Tetens, a Swedish writer (Sur les Droits Réciproques, pp. 111-113). Hübner (lib. ii. ch. 1, §§ 8, 9) seems to be of the same opinion with Tetens and Massé. Klüber (§ 288) says that naval stores are not contraband; but adds, that, in case of doubt as to the quality of particular articles, the presumption should be in favor of the freedom of trade.

The subject is not affected by the Declaration of Paris of 1856, which merely uses the word 'contraband,' without attempting to define it. The British Orders in Council of 18th February, 1854, in anticipation of the war with Russia, prohibit the exportation from the United Kingdom (as modified by the order of 11th and 24th April, 1854), to certain countries in Europe or of Russian possession, of certain enumerated articles which are clearly contraband of war, and the like exportation of other articles 'which are judged capable of being converted into, or made useful in increasing the [632] quantity of, military or naval stores,' in which are enumerated saltpetre and brimstone, and all parts of marine steam-machinery. But these Orders in Council do not pretend to decide the subject of contraband. Their operation is municipal,—to keep certain articles useful in war within the kingdom, and prevent their getting into Russian possession.

A Swedish ordinance of April 8, 1854, prohibiting the carrying of contraband in Swedish vessels, defines contraband to include saltpetre, sulphur, saddles, bridles, and all other manufactures immediately applicable to warlike purposes.

During the Crimean war, the English stopped coals on their way to a Russian port; but the Ministry said, in the debate in the House of Commons, that coals were to be regarded as *ancipitis usûs*.

The royal proclamation of 13th May, 1859, issued during the war between France, Sardinia, and Austria, warns British subjects against carrying contraband, without attempting to define it. To an inquiry, addressed by British merchants to the Foreign Office, the government declined to decide whether coals were contraband, but added, 'It appears, however, to Her Majesty's Government, that, having regard to the present state of naval armaments, coal may, in many cases, be rightly held to be contraband of war, and therefore that all who engage in the traffic must do so at a risk, from which Her Majesty's Government cannot relieve them.' (Jurist, 1859, v. 203.)

The royal proclamation of 13th May, 1861 (at the beginning of the civil war in the United States), warns British subjects against carrying 'arms, military stores, or materials, or any article or articles considered and deemed to be contraband of war according to the law or modern usage of nations, for the use or service of either of the said contending parties.' On the 26th May, a debate springing up in the House of Lords on the subject, Earl Granville, after referring to articles clearly contraband, said, 'There are certain other articles the character of which can be determined only by the circumstances of the case.' Lord Brougham thought coal might be contraband, 'if furnished to one belligerent to be used in warfare against the other.' Lord Kingsdown said, with more precision, 'If coals are sent to a port where there are war-steamers, with a view of supplying them, they become contraband.'

It may be safely assumed, that prize courts of Great Britain and the United States, in the absence of treaty stipulations or of rules of their governments, would inquire into the circumstances of each case, to determine whether articles *ancipitis usûs* were contraband of war; and that in that class they would include ships, marine steam-machinery, masts and spars in

belligerent. Nor will the fact of her having been impressed by violence into the enemy's service, exempt her. The master cannot be permitted

a manufactured state, the component materials of gunpowder, coals, articles in a manufactured state chiefly useful in war, or the component parts of armaments and military equipments. The chief circumstance of inquiry would naturally be the port of destination. If that is a naval arsenal, or a port in which vessels of war are usually fitted out, or in which a fleet is lying, or a garrison town, or a place from which a military expedition is fitting out,—the presumption of military use would be raised, more or less strongly according to the circumstances. The nature and character of the war, as being maritime or not, and the known special needs of the enemy, are also to be considered. If it is proved, as a fact in the case, that the articles are destined directly to military use,—as, if they were to be delivered to an enemy's fleet, or army, or war department,—they would be condemned for the further reason of being involved in a non-neutral trade.

In the case of the *Commercen* (Wheaton's Rep. i. 332⁴¹), the carrying by a neutral [633] of goods of a belligerent to his fleet, lying in a neutral port, deprived the neutral of his freight, which the captor usually allows him in a simple case of carrying enemy's goods. The case was, in truth, one in which the neutral, by carrying directly to the fleet of a belligerent, articles capable of use by the fleet, and necessary for its support, dropped his neutral character, and made himself, so far, a party to the war. (See note 228, *infra*, on Carrying Hostile Persons and Papers.) But it is not necessary that there should be a proved intent to deliver into military hands, to make the case one of contraband. The neutral will usually send his goods—whether purely contraband or *incipitibus usis*, the one as well as the other—to a private consignee, for sale in the market. He usually has, in fact, no intent in the matter but a commercial one, to sell his goods for the highest price. If his mortar and loaded shells will get a higher price from a humane society, to be placed on the coast to aid in rescuing shipwrecked mariners, or if his gunpowder will sell better to be used in blasting rocks, to build a church, his consignee will probably make such sales. The expectation or preference of the neutral for one use or another, belligerent or peaceful, of his goods, irrespective of their price, can rarely be ascertained by a prize court as a fact; and, if articles useful in war come within a belligerent's control, the belligerent government may buy them, or, in case of necessity, seize them, making compensation, without regard to the wishes of the owner or his agent. The truth is, the intent of the owner is not the test. The right of the belligerent to prevent certain things getting into the military use of his enemy, is the foundation of the law of contraband; and its limits are, as in most other cases, the practical result of the conflict between this belligerent right, on the one hand, and the right of the neutral to trade with the enemy, on the other. Belligerent interests might well contend, that any merchandise sent into his enemy's country gives that enemy aid or relief, moral, financial, or physical. But to prevent such trade, would be to end all neutral commerce. Neutral interests, therefore, insist on the strictest limits of the war-right of seizure, and have, at times, striven to confine the rule to instruments which are completed, and are of exclusively military use. The result of this conflict has left rather an undefined and irregular line. Articles of doubtful use the belligerent seeks to condemn, on evidence or presumptions that they were in fact intended to be, or would in fact become, whatever the intent, a direct contribution to the military force of his enemy. The chief maritime belligerents have enforced this right, while the chief neutrals have argued against it, in their books and diplomatic letters, and sought to restrict it in their treaties. So, where articles are not of a military character, but suitable for household food, as bread-stuffs, the belligerent claims the right to capture them, if bound to a port under the stress of actual siege, where the fate of the place may depend on the mere question of food. The ground is, that the circumstances necessarily bring the food into the category of a direct supply of the military necessities of the enemy.

Mr. Moseley (*Contraband of War*, pp. 9, 110) contends, that, as to goods *incipitibus usis*, the question is solely one of evidence, in each case, whether 'those very goods are or are not destined for military use;' and expresses the hope, that an adjustment may be made by the British courts throwing many articles of common use, as ship-timber, sails, cordage, marine steam-machinery, &c., from the first into the second class,—while the continental courts shall agree that articles of the second class, if they 'have a manifest destination for use in war,' shall be contraband. This, he says, will resolve such cases into questions of degrees of evidence

[¹ For 332 read 382.]—G.G.W.

to aver that he was an involuntary [632] agent. Were an act of force exercised by one belligerent power on a neutral ship or person to be

in each instance. If the learned author [634] means, by 'destination,' the actual and fixed intent of the owner,—that his intent is to be the *factum probandum*, which the prize court must be satisfied of, by proof or by the aid of artificial presumptions, in each case,—I doubt if such a thread of doctrine is to be traced in the cases; nor can I believe it to be a practicable rule in war. As suggested above, the owner will usually have no fixed intent, or his intent may be overridden by the enemy's power. Besides, if the proved intent is made to operate against the neutral in cases of articles *ancipitis usus*, why should not the absence of such intent, or proof of a contrary intent, operate in his favor, in cases of articles primarily of military use? I am inclined to the opinion, that an actual intent to deliver articles capable of military use directly into military hands, condemns the articles, at all events, as a voluntary intervention of their owner in the war; and that, whether there be or be not such an intent, the belligerent may capture certain articles, because of their destination to a place where they will come under the enemy's control, and so may be used by the enemy in direct military operations. This view is more in harmony with the laws of war in other cases. The goods of a neutral who is domiciled in enemy's territory are condemned, not because of any proved or presumed hostility of their owner, or because of any proved or presumed intent of his as to their use, but because the belligerent State, in whose territory the owner is domiciled, has such a sovereign authority over him and his property as to give that State an interest in the goods and their transit, and thus make them, in the technical language of prize courts, enemy's property. If a neutral, domiciled in a neutral land, sends goods not contraband for sale in market to a belligerent country, it is true the belligerent has some interest in the goods and their transit; but he has not sovereign authority over the owner or his goods, and to interdict such trade would be to interdict all trade between neutrals and belligerents. For these reasons, it is allowed that such goods, so destined, are not enemy's property. But one belligerent may prevent the other from obtaining direct military aid; and goods of a certain description, bound into the country of the one, are so liable to become directly military aid, that they may be intercepted by the other. This is the practical result of the conflict of the two forces of war and of trade. In administering this law, the question has arisen, whether the belligerent is limited to an inspection into the intrinsic nature of the goods themselves, or may look further. It is agreed, that a class of goods may be declared, in their inherent nature, exclusively or substantially of military use, and that these he may intercept without further inquiry. It is also agreed, that there are goods not coming within that class, but which are capable of direct military as well as civil use, as to which their intrinsic nature alone ought not to furnish conclusive proof in their favor. The question is, shall the fact of their ambiguous character stop, or shall it open, further inquiry? The weight of practice by belligerents or concession by neutrals, and of the opinions of writers, has certainly hitherto been in favor of the latter course. If further inquiry shows that the owner intended to deliver them directly into military hands for military use, he loses them, not simply from their inherent contraband nature, but by reason of his own unneutral act. Although nothing be developed as to the owner's intent, yet if the condition of the port of destination, or the character and state of the war, make it satisfactorily appear that they will, in all probability, go directly into military use, or directly tend to relieve an enemy from hostile pressure, the right of the belligerent to intercept them may be [635] exercised solely for those reasons. In such case, it rests on his right to intercept aid to his enemy, though the act of the neutral carrier is not unlawful; and the captor, therefore, pays the neutral his freight. (This part of the subject is further considered in the note 230, *infra*, on Penalty for Carrying Contraband.)

The leading English decisions as to what articles are and are not contraband of war are the following: *Richmond*, Rob. v. 325. *Brutus*, Ibid. v. 331, note. *Neptunus*, Ibid. iii. 108. *Nostra Signora de Begona*, Ibid. v. 97. *Carpenter*, Acton, ii. 11. *Neptunus*, Rob. vi. 403. *Staat-Embden*,^[1] Ibid. i. 26. *Endraught*, Ibid. i. 22. *Twende Brodre*, Ibid. iv. 33. *Twee Juffrowen*, Ibid. iv. 242. *Jonge Tobias*, Ibid. i. 329. *Maria*, Ibid. i. 340, 373. *Christina Maria*, Ibid. iv. 166. *Sarah Christina*, Ibid. i. 237, 241. *Charlotte*, Acton, i. 201. *Med Good's Hiepl*, Rob. i. 89^[11] (cited). *Ringende Jacob*, Ibid. i. 89. *Gute Gesellschaft Michael*, Ibid. iv. 94. *Apollo*, Ibid. iv. 158.

[¹ For *Staat-Embden* read *Staat Embden*.]—G.G.W.

[¹¹ For 89 read 29.]—G.G.W.

considered a justification for an act, contrary to the known duties of the neutral character, there [633] would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands [634] must seek redress from the government which has imposed the restraint upon him. (a) As to the number of military persons necessary to subject the vessel to confiscation, it is difficult to de[635]fine; since fewer persons of high quality and character may be of much more importance than a much greater number of persons of lower condition. To carry a veteran general, under some circumstances, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater, and therefore the belligerent has a stronger right to prevent and punish it; nor is it material, in the judgment of the prize court, whether the master be ignorant of the character of the service on which he is engaged. It is deemed sufficient if there has been an injury arising to the belligerent from the employment in which the vessel is found. If imposition be practised, it operates as force; and if redress is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the privity of the immediate offender. (b)

Fraudulently
carrying
hostile des-
patches.

§ 503. The fraudulently carrying the despatches of the enemy will also subject the neutral vessel, in which they are transported, to capture and confiscation. The consequences of such a service are indefinite, infinitely beyond the effect of any contraband that can be conveyed. (i) 'The carrying of two or three cargoes of military stores,' says Sir W. Scott, 'is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, that may defeat all the plans of the other belligerent in that quarter of [636] the world. It is true, as it has been said, that *one ball* might take off a Charles the XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that, in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has

Evert, Ibid. iv. 344.⁽ⁱⁱ⁾ *Jonge Margaretha*, Ibid. i. 189. *Hacket*,⁽ⁱⁱⁱ⁾ Ibid. ii. 174. *Edward*, Ibid. iv. 68. *Frau Margaretha*, Ibid. vi. 92. *Zelden Rust*, Ibid. vi. 93. *Ranger*, Ibid. vi. 125.

The principal American cases on the same point are the *Commercen*, Wheaton, i. 382; and Gallison, ii. 261. *Maissonnaire*^(iv) v. *Keating*, Gallison, ii. 325.—D.

(a) The *Carolina*, Robinson's Adm. Rep. iv. 256.

(b) The *Orozembo*, Robinson, vi. 430.

[ⁱ This is not an exact quotation from the decision in *The Atalanta*.]—G.G.W.

[ⁱⁱ For 344 read 354.]—G.G.W.

[ⁱⁱⁱ For *Hacket* read *Haabet*.]—G.G.W.

[^{iv} For *Maissonnaire* read *Maisonnaire*.]—G.G.W.

been, accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of despatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character—as an act of the most hostile nature. The offence of fraudulently carrying despatches in the service of the enemy being, then, greater than that of carrying contraband under any circumstances, it becomes absolutely necessary, as well as just, to resort to some other penalty than that inflicted in cases of contraband. The confiscation of the noxious article, which constitutes the penalty in contraband, where the vessel and cargo do not belong to the same person, would be ridiculous when applied to *despatches*. There would be *no* freight dependent on their transportation, and therefore this penalty could not, in the nature of things, be applied. The vehicle in which they are carried must, therefore, be confiscated.¹(a)

§ 504. But carrying the despatches of an ambassador or other public minister of the enemy, resident in a neutral country, is an exception to the reasoning on which the above general rule is founded. ^{Carrying diplomatic despatches.} ⁽ⁱ⁾“They are despatches from persons who are, in a peculiar manner, the favorite object of the protection of the law of nations, residing in the neutral country for the purpose of preserving the relations of amity between that State and their own government. On this ground, a very material distinction arises, with respect to the right of furnishing the conveyance. The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you. The limits assigned to the operations of war against ambassadors, by writers on public law, are, that the belligerent may exercise his right of war against them, wherever the [637] character of hostility exists: he may stop the ambassador of his enemy on his passage; but when he has arrived in the neutral country, and taken on himself the functions of his office, and has been admitted in his representative character, he becomes a sort of *middle man*, entitled to peculiar privileges, as set apart for the preservation of the relations of amity and peace, in maintaining which all nations are, in some degree, interested. If it be argued, that he retains his national character unmixed, and that even his residence is considered as a residence in his own country; it is answered, that this is a fiction of law, invented for his further protection only, and as such a fiction, it is not to be extended beyond the reasoning on which it depends. It was intended as

(a) The *Atalanta*, Robinson, vi. 440.

[¹ This is not an exact quotation from the decision in *The Caroline*.]—G.G.W.

a privilege; and cannot be urged to his disadvantage. Could it be said that he would, on that principle, be subject to any of the rights of war in the neutral territory? Certainly not: he is there for the purpose of carrying on the relations of peace and amity for the interests of his own country primarily, but, at the same time, for the furtherance and protection of the interests which the neutral country also has in the continuance of those relations. It is to be considered also, with regard to this question, what may be due to the convenience of the neutral State; for its interests may require that the intercourse of correspondence with the enemy's country should not be altogether interdicted. It might be thought to amount almost to a declaration, that an ambassador from the enemy shall not reside in the neutral State, if he is declared to be debarred from the only means of communicating with his own. For to what useful purpose can he reside there, without the opportunity of such a communication? It is too much to say that all the business of the two States shall be transacted by the minister of the neutral State resident in the enemy's country. The practice of nations has allowed to neutral States the privilege of receiving ministers from the belligerent powers, and of an immediate negotiation with them.'^(a)²²⁸

(a) Sir W. Scott's Opinion in the *Caroline*, Robinson, vi. 461.

^[228] *Carrying Hostile Persons or Papers*.—This topic requires a separate treatment from that of contraband, by reason of the actual state of the practice of nations, although logically it may seem to come within the same principle. The rule is that the neutral shall not intervene to aid a belligerent in his military operations, or to ward off or relieve the pressure of war which the other belligerent is exercising upon him. But here arises the question of degree. How much may he do, without violating this rule? The question of degree is not settled with exactness; and, where settled, it is [638] often rather by a practical adjustment of forces, than on logical reasoning. One cardinal rule is, that the neutral may trade with the enemy. Another is, that he shall not intervene in the war. The practical result of the conflict of these rules is, that, in trading with the enemy, he must not break an effective blockade, and shall not take to the enemy merchandise which is of such a character as to afford direct military aid, or which will help to relieve or avert the pressure of actual siege or blockade. These rules apply to and limit neutral trade in articles of merchandise. For a violation of blockade, the penalty is a loss of the vessel and cargo. For knowingly carrying contraband of war to the enemy, the same result would logically follow. The act is prohibited because it is an unneutral intervention. Yet, the practice of nations, in mitigation of the rule, has been to condemn only the contraband goods. The great reason for this favor is, that the merchandise prohibited consists of articles having intrinsic value at all times, in the growth, manufacture, and transportation of which, vast capital and widely extended systems of labor are permanently and inextricably involved, and whose production and transportation are necessary to commerce, and profitable to producers and carriers the world over; in short,—something in which the political economy of nations is deeply concerned. A further reason is, that the line as to what is contraband is not well settled, and depends on circumstances. These considerations have led to a practical adjustment of the question of contraband, to the effect that the neutral may carry merchandise to both belligerent markets, subject to this condition,—that, if it be contraband, it may be taken from him, at sea, and converted to the captor's use. (See note 226, *ante*, on Contraband of War; and note 230, *infra*, on Penalty for Carrying Contraband of War.)

But the subject now under consideration is of a different character. It does not present cases of property or trade, in which such interests are involved, and to which such considerations apply, but simply cases of personal overt acts done by a neutral in aid of a belligerent.

[638] § 505. In general, where the ship and cargo do not belong to the same person, the contraband articles only are confiscated, and

Penalty for the carrying of contraband.

Suppose a neutral vessel to transmit signals between two portions of a fleet engaged in hostile combined operations, and not in sight of each other. She is, doubtless, liable to condemnation. It is immaterial whether these squadrons are at sea or in ports of their own country, or in neutral ports, or how far they are apart, or how important the signals actually transmitted may be to the general results of the war, or whether the neutral transmits them directly or through a repeating neutral vessel. The nature of the communication establishes its final destination; and it is immaterial how far the delinquent neutral carries it on its way. The reason of the condemnation is *the nature of the service in which the neutral is engaged*. Suppose the neutral, instead of transmitting intelligence or orders by signals, takes the communication from squadron to squadron in the form of a verbal or written message, or gives transportation, under protection of his neutral flag, to an officer whom he knows to be intrusted with such a message,—the result must be the same. If we assume the character of the service to be settled as an unneutral intervention in direct aid of the enemy in conducting his enterprises, it must be immaterial whether the service be performed between Portsmouth and the Cove of Cork, or between Portsmouth and Hong Kong. The national character of places at which the illegal service begins and ends is also immaterial. If the message is to be carried from Portsmouth to Hong Kong by stages, the neutral that carries it on its way between neutral ports, by agreement [639] with the belligerent government, is violating the duties of neutrality as much as any other parties to the transaction.

The same reasoning applies to the carrying of corporeal instrumentalities of war. If an organized regiment of artillery, with its batteries, is to be sent from one point of military operations to another, a neutral vessel, that voluntarily aids in the transportation, engages, so far, in the enemy's belligerent service. If the character of the service is admitted to be unneutral, it is, of course, immaterial how far the neutral takes the troops on their way, and whether both or either of the *termini* of his trip are in belligerent territory.

The cases supposed are extreme, for the purpose of making more plain and undeniable the reason of the rule. The reason is, that the neutral is engaged in the belligerent service of the enemy. This, the other belligerent may prevent; and, in order to prevent, may inflict adequate penalties, to deter all others, as well as to punish the offender. It is agreed by nations that the penalty may be the condemnation of the vessel, and of any property on board which the wrong-doer fairly represents.

The question now becomes one of degree,—What acts constitute such a service to the enemy as to entail condemnation? On this, the safest guides are the decisions of prize courts, adopted as the acts of nations, and the like national acts in the way of treaties and decrees or orders.

At the beginning of the Crimean war, the Declaration of Great Britain, of 28th March, 1854 (and that of France was to the same effect), was in these words: 'It is impossible for Her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches.'

At the beginning of the civil war in the United States, the royal proclamation of neutrality of 13th May, 1861, warns British subjects against 'carrying officers, soldiers, *despatches*, arms, military stores, . . . for the use of either of the contending parties,' as 'acts in derogation of their duty as subjects of a neutral sovereign.' The decree of the Emperor of the French was more general: 'Frenchmen residing in France or abroad must likewise abstain from any act which, committed in violation of the laws of the empire or of the law of nations, might be considered as an act hostile to one of the two parties, and contrary to the neutrality we have resolved to observe.'

The Spanish decree of June 17, 1861, says, 'The transportation of munitions of war is forbidden, as well as the carrying of papers or communications for the belligerents.'

The Declaration of Paris of 1856 is silent on this subject. The proposed international code of Spanish America, of 1862, in connection with its recognition of the Declaration of Paris, had this provision: 'Besides the articles qualified as such, are to be deemed contraband of war *commissioners of every description* sent by belligerents, and the *despatches* of which they are the bearers.'

These national acts indicate that, in the opinion of nations, it is still, as heretofore,

the carrier-master is refused his [639] freight, to which he is entitled upon innocent articles which are condemned as enemy's property. But

considered that, under certain circumstances, the carrying of communications or persons, for the belligerents, may be justly deemed unneutral acts.

Turning to the decisions of prize courts, adopted and acted upon by their respective nations, we find the following history:—

The Carolina (1802), Rob. iv. 256. A Swedish vessel was engaged as one of a fleet of French transports between Italy and Egypt, employed under the control and direction of French military and naval officers. It was a clear case of employment as a transport in military operations. The vessel was lost in the charge of the captors, [640] before adjudication; and the proceeding was by the neutral owners, in the prize court, to hold the captors liable for her value. As there was no negligence charged upon the captors, Sir W. Scott might have confined himself to deciding whether the capture was made with probable cause. But, as he considered the case a clear one, he chose to decree the vessel to have been a good prize. The only point of novelty or interest was that the master set up that the vessel was so employed against his consent, by force and fraud. Sir W. Scott doubted the fact, but, without passing upon the fact, decided that, if the neutral vessel is found engaged in the transport-service of an enemy, she is to be condemned, without the necessity of determining whether the enemy got her into his service by force or fraud, or by voluntary contract. The necessities of war require this rule; and the remedy of the neutral must be against the party or power that committed the wrong.

The Friendship (1807), Rob. vi. 420. An American vessel made an agreement with the agent of the French Government in the United States to carry to France some eighty men, French officers and seamen, relics of the crews of wrecked French vessels, a part of the French naval marine, who were, on their arrival, to report to the French Bureau of Marine for orders. While on board, they were under the military orders of their superior officers, or, as Sir W. Scott said, 'their military character travelled with them.' The contract was concealed or destroyed; but enough appeared to satisfy Sir W. Scott that the vessel engaged to take no cargo; that the compensation for the use of the vessel was paid by the French Government; and that the whole transaction was a movement of a portion of the French marine from a port in the United States to a port in their own country, under military control and supervision, in a neutral vessel engaged and paid for the purpose by the French Government. Sir W. Scott held that she was 'a transport engaged in the immediate military service of the enemy.' In such a case, he held it to be immaterial what was the form of the contract,—whether it passed the control and temporary ownership of the vessel to the hirer, or was only a contract to convey the persons who should be put on board. The nature of the service rendered, was that of a transport. He also held that it was not necessary to show that this particular transportation was part of a specific military operation, or an immediate expedition of active service. 'The shifting of drafts in detachments, and the conveyance of stores from one place to another, is an ordinary employment of transport-vessels; and it is a distinction totally unimportant, whether this or that case may be connected with the immediate active service of the enemy.' In answer to the argument that it would be unjust to lay down a rule which would prevent a neutral vessel taking a single military officer on his way home from a neutral country, he replied, 'If he were going merely as an ordinary passenger, as other passengers do, at his own expense, the question would present itself in a different form. Neither this court nor any other British tribunal has ever laid down the principle to that extent.' He decided the case upon the ground, that the vessel was, for the time, engaged as a transport, in the service of the French Government, to carry military persons to France.

The Orozembo (1807), Rob. vi. 430. An American vessel went from Rotterdam to Lisbon, and there took in three Dutch military officers of distinction to carry to Batavia. The vessel held out a false destination to Macao. By the contract produced, she was to take no cargo, and was to receive one thousand dollars per month for her employment, without reference to the number of persons put on board. This contract [641] purported to be made with a private citizen at Lisbon; but Sir W. Scott was of opinion, from other evidence, that the real contract was made with the Dutch Government while the vessel was at Rotterdam. It was held that she must be considered to have been let as a transport to the Dutch Government, to convey military and other persons on their way from the parent country to a distant dependency.

where the ship and the innocent articles of the cargo belong to the owner of the contra[640]band, they are all involved in the same penalty.

In such cases, he considered the number of the officers immaterial. She was engaged, by contract, to carry such persons as the Dutch Government thought it worth while to pay such a sum to have transported to a distant dependency, there to take upon them the exercise of their military functions; and, to further the success of her service, the vessel held out a false destination.

The principle, that a neutral in the enemy's service as a transport, is to be condemned, is undeniable. The only interest in this case is the treatment of the evidential facts tending to prove the character of the service. In the course of his opinion, Sir W. Scott refers to the fact that there were also on board two civil officers of the government, and says, 'Whether the principle would apply to them alone, I do not feel it necessary to determine;' but intimates an opinion that it would. But it is plain, he confines this *dictum* to the case before him; that is, the case of a vessel let out to a belligerent government to carry whatever persons it may designate. Even as a *dictum*, it does not touch the case of a neutral vessel not let out as a transport, and merely having civil officers of a belligerent government on board, without other circumstances tending to show the vessel herself to be in the enemy's service.

The Atalanta (1808), Rob. vi. 440. A Bremen ship, at the Isle of France, was detained there by the French Governor several days to take a packet; and the supercargo arranged a plan to conceal it in case of search or capture by a British cruiser, which he carried out by actually concealing it, so that its discovery was accidental. It was addressed to the French Minister of Marine at Paris; and, in the event of her arrival at Bremen, the supercargo was to give it to a French officer of artillery, second in command in the island, who was also a passenger on board, under the false designation of a planter, and who was the real bearer of the despatch. Sir W. Scott held the vessel answerable for the acts of the supercargo, who had used her for the purpose; and decided, that, if a neutral does carry official despatches from a distant island to the mother country in time of war, and fraudulently endeavors to defeat the search of the captors, and so 'lends himself to effect a communication the enemy may cut off, under protection of an ostensible neutral character, he does in fact place himself in the service of the enemy's State.' Although he intimates an opinion that the knowingly carrying such despatches under such circumstances would, of itself, be an unneutral intervention which would forfeit the vessel, he does not fail, in his decision, to preserve the element of fraudulent concealment. The learned judge said the despatches were, in fact, of a noxious character, giving information as to the military condition of the island; but he took care to say that this was of no great consequence; for, as the despatches were known to be official, and were to the parent government, from a distant colony which was liable to the pressure of war, and were sent under arrangements for concealment, showing them to be important, a valuable unneutral service to the enemy was undertaken.

These are the only cases of condemnation of neutrals, for carrying persons or papers, in which we have the fully reported opinion of the court. The cases of the *Constantia*, *Susan*, and *Hope*, all decided the same year (1808), are described in a note [642] by the reporter (Rob. vi. 440⁽¹⁾), with the substance of the result, but without professing to give the language of the judge. In each of these cases, there was a condemnation. The *Constantia* was a Danish vessel bound from the Isle of France to Copenhagen, the master of which knowingly took charge of a packet from the governor of the island addressed to the French Ambassador at Copenhagen, which he did not disclose and give up to the captors, albeit he practised no fraud in the concealment. The *Susan* was an American vessel bound from Bourdeaux to New York with a letter to the Prefect of the Isle of France, which the master did not give up to the captors, although he did not practise fraud in concealing it. The *Hope* was an American vessel bound from New York to Bourdeaux, having on board a French officer of high military rank, entered as a merchant's clerk, and despatches from French officials in the West Indies and Isle of France, which were concealed in the hold. The court thought the master a party to these concealments. In these cases, the judge is said to have remarked upon the frequency with which neutrals were detected carrying despatches for the enemy, either with actual knowledge or under circumstances which fairly precluded them from setting up ignorance.

[¹ For 440 read 461.]—G.G.W.

And even where the ship and the cargo do not belong to the same person, the carriage of contraband, under the fraudulent circum-

We now come to cases in which there was no condemnation.

The Caroline (1808), Rob. vi. 461. This was an American vessel, from New York to Bourdeaux, having on board a despatch from the French Minister in the United States to his own government. Sir William Scott distinguished this from the preceding cases, on the ground that the despatch was not from an executive officer of the enemy, in the enemy's own territory, but from a diplomatic agent, in a foreign neutral country. All nations have a permanent interest in maintaining diplomatic relations with each other, and ought not to be deprived of it by the fact that certain nations are at war. This implies a right of a neutral to have ambassadors from both belligerents residing at his court, as well as a right to send his ambassadors to their courts, and carries with it some right of the belligerent ambassador at the neutral court to have free communication with his own government. Such communications are not necessarily, or by any presumption, hostile to the interests of his country's enemy. They may be so, but they may not be; and the rule is that they may be sent under the neutral flag. If the ambassador violates the neutrality of the country to which he is accredited, by overt acts, or if he endeavors to draw that country into the war, the remedy must be diplomatic and political, and not by a rule allowing a capture of all despatches in neutral custody.

The Madison (1810), Edwards, 224. This was an American vessel from Dieppe (held to be a hostile port) to Baltimore, having on board despatches from the Danish Government to the Danish Consul-General in the United States. This was held to come within the privilege of diplomatic correspondence with an agent in a neutral country.

The Rapid (1810), Edwards, 228. This was an American vessel bound from New York to Tonningen, a free port, having on board papers in an envelope addressed to a private citizen in Tonningen, and given to the master by a Dutch gentleman residing in New York. The packet, of itself, carried no evidence of a hostile official character. The person who intrusted it to the master had, in fact, been sent by the Governor of Batavia to New York, to induce American merchants to engage in certain commercial enterprises for the benefit of Java; but he was held to have neither a diplomatic nor a military character, nor to be an officer whose functions needed any recognition from the government of the United States. The packet, being opened in [643] court, was found to contain letters with important information addressed to the Dutch Government, which the receiver in Tonningen was to forward. The master made affidavit of his ignorance of the official character of the packet, and of its hostile destination.

It will be seen that the facts of this case presented two positions of law, either of which, if adopted by the court, decided it at once. If the fact that the vessel was going from one neutral port to another was conclusive in her favor, or if the fact of having important despatches on board of a noxious character was conclusive against her, there need have been no further inquiry. Neither fact was held conclusive. There being no pretence that the vessel herself was in the enemy's service, the case turned upon the nature of the act done. In itself, it was noxious. Was that conclusive? It was held not to be so. The doctrine was here clearly laid down, that, in the case of a neutral vessel not in the enemy's service, but engaged regularly in her own commercial business, the consequences of having a noxious despatch on board depended upon the delinquency of the master or persons in charge. Sir William Scott disclaimed any intention to lay down a rule which should deter a neutral master from taking private letters. 'His caution must be proportioned to the circumstances under which such papers are received.' This gives the key to the rule. Among these circumstances (independent of the character of the packet, which the judge assumed to be apparently private) are the person from whom, and place at which, it is received, and the person and the place of its destination. 'If he is taking his departure from a port⁽¹⁾ in a hostile country, and still more, if the letters are⁽¹¹⁾ addressed to persons resident in a hostile country, he is called upon to exercise the utmost jealousy. . . . On the other hand,⁽¹¹¹⁾ when^(1v) the commencement of the voyage is in a neutral

[¹ For a port read a hostile port.]—G.G.W.

[¹¹ For letters are read letters which are brought to him are.]—G.G.W.

[¹¹¹ After On the other hand, a clause is omitted.]—G.G.W.

[^{1v} For when read where.]—G.G.W.

stances of false [641] papers and false destination, will work a confiscation of the ship as well as the cargo. The same effect has likewise been

country, and is⁽¹⁾ to terminate in a neutral country,⁽¹¹⁾ . . . there is less to excite his vigilance.' Under the circumstances, the vessel was acquitted.

From these decisions, the following doctrines may be deduced:—

(1) If a vessel is in the actual service of the enemy as a transport, she is to be condemned. In such case, it is immaterial whether the enemy has got her into his service by voluntary contract, or by force or fraud. It is also, in such case, immaterial what is the number of the persons carried, or the quantity or character of the cargo; and, as to despatches, the court need not speculate upon their immediate military importance. It is also unimportant whether the contract, if there be one, is a regular letting to hire, giving the possession and temporary ownership to the enemy, or a simple contract of affreightment. The truth is, if the vessel is herself under the control and management of the hostile government, so as to make that government the owner *pro tempore*, the true ground of condemnation should be as *enemy's property*. The interpretation of this technical phrase of prize law will cover all such cases; and it would have saved some mistaken deductions, if the *Carolina*, *Friendship*, and *Orozembo* had been condemned on that ground, in terms.

(2) If a vessel is not in the enemy's service, still, if the master knowingly takes for the enemy's government, or its agents, persons or papers of such a character and destination that the transporting of them under the neutral flag is an actual belligerent service to the State, it is an unneutral act, which forfeits the vessel. If he avers ignorance of the character of the persons or papers, all the circumstances are to be considered, for the purpose of determining, not only the truth of his averment, but whether his ignorance, though real, is excusable. He is bound to a high degree of diligence, in such cases; and, if the circumstances fairly put him on inquiry, which he [644] does not properly pursue, he will not be excused. Among these circumstances, are, the character of the despatch, as far as shown from itself, its source, its destination, the circumstances attending its delivery or custody, and the character of the ports of departure and destination of the vessel, as being neutral or hostile. In a case of a vessel not in the enemy's service, but doing such acts for his benefit, can she be said to be enemy's property *pro hac vice*? In the *Tulip* (Washington's Rep. iii. 181), an American vessel, during the war with England, carrying despatches from a British Minister to his own government from a neutral port under a safe-conduct, agreeing to put them on board some homeward-bound British vessel, was held to be, *pro hac vice*, enemy's property; but, in that case, the vessel, being American, was condemnable for traitorously aiding the enemy, and the form of condemnation was of little consequence.

(3) It is not an unneutral intervention, entailing a penalty, for a neutral to knowingly carry a despatch of a character recognized as diplomatic, in the international intercourse of States. Of this class, is a despatch passing either way between the enemy's home-government and its diplomatic agent in a neutral country, or between a neutral government and its diplomatic agent in an enemy's country; and consuls-general come within the privilege of this rule. But, if the despatches are placed in a private vessel of the nation with which the ambassador's nation is at war, and she is captured by a cruiser of the former nation, the despatches have no immunity. (*Tulip*, Washington's Rep. iii. 181.)

The above are the principles laid down by the English prize courts, and adopted by the British Government, which no other prize courts have overruled, and no national acts of other States, in the way of treaties or permanent orders, have disclaimed.

The case of the *Trent*, in 1862, has given rise to an extended discussion of this subject by writers on public law, as well as between the governments concerned. Among the writings, may be named M. Hautefeuille's pamphlet, 'Questions of Maritime International Law'; Letters of Historicus (Mr. Harcourt) to the *London Times*; Professor Parker's Lecture (Harvard University); Dr. Woolsey's Introduction, § 184; the Speech of the Hon. Charles Sumner in the United States Senate, 9th January, 1862; M. Thouvenel's despatch to M. Mercier of Dec. 3, 1861; and Professor Mountague Bernard's pamphlet (Oxford, 1862), which is devoted exclusively to that case, and brings to it original thought as well as research.

THE CASE OF THE TRENT. At an early stage of the civil war in the United States, in

[¹ For and is read and it is.]—G.G.W.

[¹¹ For in a neutral country, read at a neutral port.]—G.G.W.

held to be produced by the carriage of contraband articles in a ship, [642] the owner of which is bound by the express obligation of the

October, 1861, the rebel government appointed Mr. Mason to England and Mr. Slidell to France, each with a secretary, to act as commissioners or ambassadors to those countries. The government had not been recognized by any nation, and could not maintain diplomatic relations; but it had been recognized as a lawful belligerent. The object of the mission of Mason and Slidell was to aid the insurgent government by all means in their power; to urge its recognition by the European States; to effect treaties of commerce or alliance; to procure, if desired by their government, [645] the intervention of European powers; to thwart the diplomacy of the United States in Europe; and to aid the financial and military needs of the Confederacy, by granting commissions, securing military and naval outfits, &c.,—they not being themselves military persons, or any part directly of a specific military enterprise. The rebel ports were then under strict blockade; and there was hardly a merchant-vessel of rebel citizens crossing the ocean, and only two or three naval vessels under that flag, and they subject to strict watch, with very limited opportunities against the overwhelming maritime superiority of the United States. It may be said to have been essential that these envoys should make the passage under neutral flags. They succeeded in running the blockade in fast steamers to Havana. At Havana, their character and destination were of public notoriety; and a United States vessel of war was there watching their movements. They took passage, on their way to Europe, in a British steamer, the *Trent*, bound from Havana to Nassau, from which latter place a regular line of steamers, connecting with the *Trent*, ran to England. Their character and destination were well known to the agent and master of the *Trent*, as well as the great interest felt by the rebels that they should, and by the United States officials that they should not, reach their destination in safety. The *Trent* carried the regular mails from the South American continent and Cuba to England, to transfer them at Nassau to the next steamer on the route. She had a large number of passengers, most of whom were also bound to England. Messrs. Mason and Slidell, and their secretaries, had despatches and instructions from their own government, which were under their personal charge.

On the high seas, a few hours before she would reach Nassau, she was stopped and searched by the United States steamer *San Jacinto*, Captain Wilkes. Messrs. Mason and Slidell were found on board; but the despatches they secreted, and confided to some of the passengers to be taken to Europe. There was no evidence or charge that the commander of the *Trent* aided in the concealment or forwarding of these despatches. He did, however, deny the right of search, refused all facilities for it, and obstructed it by every thing but actual force; and made it known to Captain Wilkes that he yielded only to superior power, and that, if made a prize, he and his crew would lend no aid in carrying the *Trent* into port. Captain Wilkes took Messrs. Mason and Slidell and their suite from the *Trent*, permitted her to proceed on her passage, and carried his prisoners to the United States.

Earl Russell, in his demand upon the United States Government (letter to Lord Lyons, Nov. 30, 1861), stated the proceeding as simply a case of a forcible taking of four passengers from an innocent British vessel at sea by an American ship of war, making no reference to their official character, or even to their nationality. Mr. Seward's reply (letter to Lord Lyons of Dec. 29, ⁽¹⁾ 1861) goes at length into the subject. He considers, first, whether these persons were, as he terms it, contraband of war. He cites Vattel as saying, 'War allows us to cut off from our⁽¹⁾ enemy all his resources, and to hinder him from sending ministers to solicit assistance,' and Sir William Scott, as saying, 'You may stop the ambassador of your enemy on his passage;' and applies the test, in the words of Sir William Scott, 'If⁽¹¹⁾ it is of sufficient importance to the enemy that such persons should^(1v) be sent out on the public service at the public expense, it should afford equal ground of forfeiture of^(v) the vessel that may be let out for a purpose so intimately connected with the hostile operations;' and he comes to the conclusion, that these persons were, from the nature of their office [646] and destination, contraband. Assuming, then, which was not denied, that Captain Wilkes had a right to visit and search the *Trent*, as an act of maritime belligerency, and showing that he exercised the right of search in a proper manner,

[¹ For 29 read 26.]—G.G.W.

[¹¹¹ For If read When.]—G.G.W.

[^v For of read against.]—G.G.W.

[¹¹ For our read an.]—G.G.W.

[^{1v} For should read shall.]—G.G.W.

treaties subsisting between his own country and the capturing country, to refrain from carrying such articles to the enemy. In [643] such a case,

he examines the last question, whether the taking of these persons out of the ship, by Captain Wilkes, was justifiable, under the accepted law of nations.

He at once disclaims, what Lord Russell assumed to be the ground of the act, a right to take rebels or other criminals or enemies, as such, from a neutral vessel, as an exercise of ocean police. He states that the whole course of Captain Wilkes was in the exercise of a belligerent right of search and capture. In this connection, he alludes to the claim long made and enforced by Great Britain, and resisted by us, of a right to take her own seamen from American vessels. As such seamen are not enemies, nor enemy's property, nor contraband, the exercise of that power was simply an exercise of ocean police, for municipal purposes, over vessels of a foreign country. He treats this reclamation of Lord Russell as a renunciation of such a claim in the future by Great Britain; and agrees, that, if such had been the character of Captain Wilkes's act, it would have been indefensible. Having resolved the question of contraband in favor of the captors, he proceeds to discuss the rights and duties of a cruiser which finds contraband persons on board of a neutral vessel. He contends that it is clearly the right and duty of the cruiser to make the vessel a prize, and send her in for adjudication. He adverts to the fact that, in such cases, the prize proceedings can only be against the vessel. A prize court is not competent to decide abstractly upon the character of persons on board, and decree them to be either prize or prisoners of war. Its only function is to pronounce on property, whether it be prize or no prize; and it passes upon the *status* and character of persons, only as means of determining the *status* and predicament of the *res*. He remarks upon the unsatisfactory nature of such a circuitous proceeding as a mode of determining the character and fate of persons, owing to the liability of a defeat of the purpose by the accidents and incidents of all trials. The vessel may be restored or condemned on grounds independent of the character of the persons in question. The prize court has no power directly to control the persons found on board, after their evidence is given, or to restore them to the claimants; so that, after all, the question must be left to diplomacy. Still, he considers that this process, though unsatisfactory, is all that the laws of war have provided, unless the cruiser can take the contraband persons from the vessel *jure belli*, leaving her to proceed on her course.

As to such a right, he says that the United States have always denied its existence, and that to claim it in this instance, would be to reverse the whole course of our history. After pointing to the evils that might follow the exercise of the right, he says, 'I think all unprejudiced minds will agree, that, imperfect as the present judicial remedy may be supposed to be, it would be, as a general practice, better to follow it than to adopt the summary one of leaving the decision with the captor, and relying upon diplomatic debate^[1] to review his decision.' Had the act of Captain Wilkes, therefore, been for the purpose of taking contraband persons out of a neutral vessel, it would have been disclaimed. But, having been for the purpose of making a prize of the vessel, with the contraband persons on board, Mr. Seward next proceeds to consider the effect of the release of the vessel.

He observes upon the fact that it was not a case in which, at the request or with the consent of the neutral, what had been seized was surrendered to the captors, upon a [647] release of the vessel. The master of the Trent made no request or assent; and the release was the act of Captain Wilkes solely. Mr. Seward then refers to the exceptions to the rule that the captor must send in his prize for adjudication, and finds them all to be cases of substantial necessity, excusing the performance of what is else a duty. He then examines the statements of Captain Wilkes as to the motives which induced him to release the vessel, and finds that he was governed mainly by a desire to relieve the large number of passengers, and an unwillingness to subject the mails to the delays consequent upon the sending-in of the vessel; although it also appeared that the want of force to bring in both vessels, conveniently and safely, operated somewhat upon his mind. Mr. Seward concludes that, while the comity of Captain Wilkes, and his willingness to relinquish for himself and his crew their large possible interest as captors, are to be applauded, he did in fact, without being aware of it, take a step which made the detention and bringing-in of Mason and Slidell unjustifiable, under those rules of war for which the United States have argued, negotiated, and fought.

Mr. Seward concludes by declaring that the persons in question, held as prisoners of war,

[1 For debate read debates.]—G.G.W.

it is said that the ship throws off her neutral character, and is liable to be treated at once as an enemy's vessel, and [644] as a violator of the solemn compacts of the country to which she belongs.^(a)

would be liberated. By an arrangement between Mr. Seward and Lord Lyons, they were placed on board an English war-vessel, which took them to Nassau, the port of destination of the Trent; thus placing things, as far as possible, in *statu quo ante*.

Earl Russell, in his letter to Lord Lyons, of Jan. 23, 1862, reviews the letter of Mr. Seward on the point of the contraband character of Messrs. Mason and Slidell, and comes to a different result. As the affair was now settled, this letter was for the purpose of precluding an inference, in case of silence, that he agreed to Mr. Seward's position. He places his argument on two grounds,—*first*, that the office and character of the persons detained were not such as to make them contraband; and *second*, that, if contraband in the abstract, they were not, on board the Trent, contraband in such a sense as to involve her in any penalties, since her passage was between neutral ports. On the first point, Earl Russell contends that Messrs. Mason and Slidell have the protection which is accorded to diplomatic agents, by the decisions of Sir William Scott. He argues that this protection cannot be confined to persons who have been already received as diplomatic agents, or persons sent from regularly recognized sovereignties. The nations of Europe having recognized the Confederate Government as belligerent, and their subjects having many important rights of person or property under the control of that *de facto* government, and the recognition of belligerency carrying with it rights as well as duties, neutral nations have an interest in such imperfect diplomatic relations as they may maintain with commissioners or other diplomatic agents from such *de facto* governments. 'It appears to Her Majesty's Government to be a necessary and certain deduction from these principles, that the conveyance of public agents of this character on⁽¹⁾ their way to Great Britain and France, and of their credentials and⁽¹¹⁾ despatches (if any),⁽¹¹¹⁾ was not, and could not be, a violation of the duties of neutrality.'

As to the second point, that the Trent was plying between neutral ports, Earl Russell seems to take the broad ground that that fact was conclusive in her favor. He reasons that a vessel cannot be considered as unlawfully carrying contraband, if her own destination is *bonâ fide*, and not ostensibly merely, to a neutral port.

As to the character of the Trent as a mail-steamer, Earl Russell disclaims any privilege or immunity to her from search and capture, or from the penalties of violated neutrality, on that ground; but, referring to the importance of the regular and [648] unobstructed passage of mails, deprecates detaining or interfering with them 'without the very gravest cause.'

On the point of the immunity of diplomatic agents, Earl Russell denies the distinction Mr. Seward had made, on the authority of Sir William Scott's quotation from Vattel: and contends that Vattel, in speaking of stopping 'the ambassador of your enemy on his passage,' refers to the right to do so, as against your enemy, assuming that you do it where you have jurisdiction; and that Vattel does not deny a right to neutrals to carry such an ambassador. He distinctly states that Great Britain will not admit, in any future case, that the carrying of such agents on such a voyage, under such circumstances, would be a justifiable cause of capture of a vessel, although regularly taken in for adjudication.

This celebrated case can be considered as having settled but one principle, and that had substantially ceased to be a disputed question; viz., that a public ship, though of a nation at war, cannot take persons out of a neutral vessel at sea, whatever may be the claim of her government on those persons. It is to be borne in mind that Earl Russell, in his demand, makes no reference to the diplomatic character of Mason and Slidell, or to any special right or exemption in this case. He presents the naked case, that a United States ship of war had taken persons from an

(a) The Ringende Jacob, Robinson's Adm. Rep. i. 91. The Sarah Christina, Ib. 244.^(1v) The Mercurius, Ib. 288. The Franklin, Ib. iii. 217. The Edward, Ib. iv. 69. The Ranger, Ib. vi. 125. The Neutralitet, Ib. iii. 295.

As to how far the ship-owner is liable for the act of the master in cases of contraband, see Wheaton's Rep. ii. Appendix, Note I. 37, 38.

[¹ For character on *read* character from Havana and St. Thomas on.]-G.G.W.

[¹¹ For and *read* or.]-G.G.W.

[¹¹¹ After (if any) *insert* on board the Trent.]-G.G.W.

[^{1v} For 244 *read* 237.]-G.G.W.

[645] § 506. The general rule as to contraband articles, as laid down by Sir W. Scott, is, that the articles must be taken *in delicto*, in Must be taken *in delicto*.

innocent British neutral vessel at sea. To his reclamation against such a proceeding, the United States were only too glad to assent; considering it as a triumph of their own principles, secured by their own decision, made against a strong national feeling in the particular case, on the demand of the only power that had ever contended for the opposite doctrine.

Beyond this, the Trent case settles nothing. Mr. Seward considered the persons to be contraband of war, from the nature of their office and the position of the power they assumed to represent. This was denied by Earl Russell, and left unsettled. Mr. Seward considered that the *termini* of the voyage of the Trent were immaterial, as the destination of the persons was certain, and she knowingly took them on their way. Earl Russell contends that the neutral *termini* were conclusive in her favor; and this was left unsettled. Earl Russell claimed for private mail-vessels no immunity, but only a more careful consideration. Mr. Seward restores the persons, on the ground that, if a captor relinquishes his prize without necessity, he cannot take persons or cargo out of her as contraband,—a principle well established in the law of nations. But the ground on which the British Government put their demand,—that persons could not be taken out of a neutral vessel by a belligerent, whatever the claim upon them,—must be considered as settling that doctrine in favor of the historical American position, as there is now no nation to call it in question.

After this analysis of the case of the Trent, it will be seen that the letters which were written to the United States Government by the Ministers of Foreign Affairs of the great neutral powers of Europe, urging the United States to yield to the demands of England, though well intended, were written under a misconception of the character of the case. They were written before hearing from America, upon the view of the case presented by England, and in the belief that it was simply an attempt to take rebel or traitorous citizens, or non-military enemies, from a neutral vessel in which they were passengers. In short, it was supposed to be an attempt to exercise [649] an act of ocean police over neutral vessels. The nations of Europe naturally called upon the United States not to reverse its whole policy and history, and urged it to adhere to those rights of neutrals for which it had contended, in sympathy with the continent of Europe, against England. The letter of M. Thouvenel, of Dec. 3, 1861, is the only one that goes into the subject fully; and it cannot be said that it is a satisfactory presentation of it. He first refers to the treaties between the United States and France, in which it was agreed that 'the same liberty [freedom of enemy's property in neutral vessels] be extended to persons who are on board a free ship, with this effect,—that, although they are enemies to both or either party, they are not to be taken out of that free ship unless they are soldiers, and in actual service of the enemies.' (Art. 23 of convention of 1798, and art. 13 of convention of 1800.) And, although these articles were only agreements between the two nations, and both provisions had expired and never been renewed, he contends that 'Messrs. Mason and Slidell were, therefore, by virtue of this principle, . . . perfectly free under the neutral flag of England.' An existing treaty with France would have no effect upon rights between us and England, under general law; and an expired treaty could not do less than have no effect. On the question whether Messrs. Mason and Slidell were contraband of war, his ground is that the right to capture, whatever their character, is conclusively settled against the United States by the fact that the voyage of the Trent was between neutral *termini*. If not contraband, the only remaining reason for justifying their seizure he suggests to be the claim of a right to take them as rebels; and the objection to this he puts upon the ground that it would be a violation of 'the [650] principle which constitutes a ship to be a portion of the territory of the country whose flag she bears,' which, Professor Bernard well says, 'is no⁽¹⁾ principle at all, but a metaphor; useful, like other metaphors, as presenting a certain amount of truth in a lively and popular form, but, like them, unfit to be made the basis of an argument.' M. Thouvenel, therefore, for the solution of a question of war-rights between the United States and England, furnishes only an expired treaty between the United States and France, an unsound and inapplicable rule as to neutral *termini*, and a metaphor.

The letters from the Ministers of Foreign Affairs of other European powers were in general terms, and evidently on the assumption that the act was simply an attempt to take from

[¹ For is no *read* is indeed no.]—G.G.W.

the actual prosecution of the voyage to an [646] enemy's port. 'Under the present understanding of the law of nations, you cannot generally

neutral vessels persons on whom we made a claim, and similar to the taking of her seamen from our vessels by Great Britain. As the United States considered the only doubtful question of law involved to be, whether the knowingly carrying these persons would have justified Captain Wilkes in making a prize of the Trent and taking her in for adjudication, these letters, including that of M. Thouvenel, were mainly *diverso intuitu*, and threw no light on that question, as far as they touched it. They were not received by Mr. Seward until his course had been decided upon (Mr. Seward to M. Mercier, Dec. 27, 1861); but they were courteously acknowledged, and, at least, are evidence of the sensitiveness of the continental powers on the subject of the freedom of neutral vessels.

The difficulty of applying the machinery of prize courts to a case like that of Messrs. Mason and Slidell, will be seen if we suppose Captain Wilkes to have taken the Trent into port for adjudication. Proceedings could not be had against the persons, but only against the vessel; and the only question for the court would be, whether the Trent was or was not good prize. If she were condemned for resisting a proper search, or for fraudulent concealment of despatches or persons, or for any gross misconduct of her master in discharge of his duties to the court, the decision would not settle the question of the persons. If the owners of the Trent should be permitted to take her, before decision, upon giving stipulation for her value, or if she should be sold by consent or by order of court, and the proceeds substituted for the vessel, the cause would degenerate into a contest for a given sum of money. Whether the final decree should be of condemnation or restitution, and whether the vessel were sold, or remained in specie, the result would only be to give her or her value to the United States or to the British owners. And where would be Messrs. Mason and Slidell, and how would they be affected? They could not be condemned or released by the court. They would doubtless have been held as prisoners of war by the United States Government. If the court had condemned the vessel on the ground of carrying noxious persons, the United States would have a decision of its court to adduce, in refusing to give them up. If the decision should be in favor of the vessel, her owners might not demand back her passengers *in statu quo ante*, and could not be compelled to make the demand; nor, if made, could a prize court enforce it. In the event of a decision favorable to the captors, the case of the persons would still be a diplomatic one. The conclusion, therefore, is that probably, but not certainly, the prize court would decide the question of property, by determining the legality or illegality of the neutral's act in carrying the persons,—that is, whether the service rendered was a contraband service; and, in that event, the two governments would have had all they ever have in any case of capture in war,—the decision of a belligerent's [651] prize tribunal, to affect and qualify their sovereign relations. That this is a valuable process to preserve peace, satisfy conflicting opinions, and deter cruisers from illegal acts, all experience shows. That it is, to a great extent, unsatisfactory in a question of rights and liabilities of persons, is not to be denied; still, as Mr. Seward remarks, 'it would be better to follow it, than to adopt the summary one of leaving the decision to the captor, and relying upon diplomatic debates to review it.'

But, what would probably have been the decision of an American prize court? It may be safely assumed that the general right to stop and search private neutral vessels, whether they carried passengers and mails or not, would be unquestioned; and that the validity of the capture would depend upon the character of the act of the Trent in giving transport to these persons and their despatches. It could not be pretended, upon the facts, that the Trent herself had been engaged in the service of the enemy's government as a transport, within the scope of the cases of the *Carolina*, *Friendship*, and *Orozembo*, so as to make her enemy's property. If the court saw no proof of fraudulent concealment of persons or papers by the Trent herself, or of neglect or refusal to give up papers known to be of importance and the objects of search or proper objects of evidence, the case would not necessarily come within the rule of the *Constantia*, *Hope*, and *Susan*. There is no decided case in England or America, that required the condemnation of the vessel, even if Messrs. Mason and Slidell had not the immunity of diplomatic persons.

The decisions bearing upon the cause would have been those of the *Caroline*, *Madison*, and *Rapid*. They would have touched the question, whether the men and their papers were entitled to diplomatic immunity, but would not have decided it. If the Confederacy had been

take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and

a recognized State, and the passengers simply diplomatic agents, they would have had that immunity, unless the distinction referred to by Sir William Scott, quoting Vattel, should be sustained,—between an enemy's ambassador once received by the neutral, and one on his way to his post at the neutral court, whose reception has not been passed upon by the neutral. This is a practicable distinction, and is adopted by Mr. Wheaton in the text. It has, too, in its favor the argument that it is not certain that the neutral to whom he is accredited will receive the ambassador, as that is always at the option of a nation; and, before he is received, the neutral cannot be said to have a vested interest in his agency, nor, which is more, can the capturing power be said to have the neutral's good faith to rely upon that the ambassador is not on a noxious errand solely. Yet, it cannot but be doubted whether Vattel intended to assert the right to seize a diplomatic agent, on his way to his post, from a neutral vessel, and that the conveying him by a neutral was a violation of neutrality. And it will be contended that the convenience of nations requires that all *bonâ fide* diplomatic agents shall be protected *eundo et redeundo*. The prize courts, when the case shall arise, will be obliged to decide that question substantially on principle, and without a direct precedent.

But, in the Trent case, the further question would have been presented, whether these officials could have the immunity of diplomatic agents at all, if the asserted distinction from Vattel was denied. That point certainly would have called for an original decision, without direct authority. Their position was *sui generis*. The power they were sent to act for, was not recognized by any nation as a State; and it would be argued that their agency was not an ordinary one of established friendly diplomacy in which neutrals are interested, but an agency to obtain aid abroad for an [552] insurrection, coupled with and covered by a possible future diplomatic character, in case the nations of Europe should recognize the Confederacy, or otherwise receive its agents in some qualified capacity.

As the official character of these persons, the general nature of their mission, and the probable general character of their papers, and the *termini* of their journey, were well known to the persons in charge of the Trent, and they took them on board knowingly and voluntarily to frank them under the neutral flag over a part of their hazardous passage, there can be no doubt that the fate of the Trent would have been the same, whether her *termini* were neutral or hostile ports. (See the Rapid, Edwards, 228, and Professor Bernard's pamphlet on the Trent Question, 28–31.) The metaphor of 'neutral territory' would give no aid; for the obstinate question remains, what kind of acts may or may not be done with impunity by this bit of neutral territory which is found afloat on the common territory of all nations.

The case of the Trent has called forth pamphlets from several writers on public law. Professor Bernard is of opinion that the decisions of courts have limited condemnations to cases of vessels practically in the enemy's service as transports, or of vessels which have carried noxious persons or papers for the enemy's government or its agents, either with the knowledge of their character, or under circumstances affecting them with presumed knowledge; and that the place where, and persons from whom, the vessel receives the noxious articles, and the place or person to whom they are to be delivered, as well as the apparent character of the despatches themselves, are only evidential facts tending to affect the neutral with knowledge, or to put him upon the duty of inquiry. He does not think that the right to take military persons from neutral vessels, independently of the capture of the vessels as prize, has ever existed as a principle of modern international law, notwithstanding the language of the treaties on that subject. Historicus (Mr. Harcourt) does not differ much from Professor Bernard, except that, by his early position on the subject of the destination of the Trent, he seemed rather to connect the case with the doctrine of 'continuous voyages,' applied where the final destination of cargo is in doubt. M. Hautefeuille's pamphlet sounds strangely in the ears of an American or Englishman accustomed to the training of judicial discussions or to the stern facts of maritime belligerency. The following is a synopsis of his position: (1) The object of search is to determine two things,—*first*, whether the vessel is neutral or enemy's property; and, *second*, whether it is carrying contraband. On the question of enemy or neutral property, he says, 'The proof is by production of the ship's papers, to which implicit faith must be given. . . . When it is proved, by these documents, that the vessel is neutral and bound to a neutral country, the visiting vessel ought immediately to withdraw.' In fact, he makes the papers

it is not necessary to wait till the goods are actually endeavoring to enter the enemy's port; but beyond that, if the goods are not taken in

produced conclusive. (2) As to the carrying of contraband, he says distinctly that destination to an enemy's port is essential to affect the cargo as contraband; and, as to the destination, he says, 'When a vessel, recognized as a neutral one, is going towards a harbor belonging to the enemy, it is necessary to obtain the certainty that it does not carry contraband of war. The ship's papers relating to the cargo will prove this: and *their statement is to be believed*; and every other mode of verification is absolutely prohibited.' (3) As to the destination of the vessel, M. Hautefeuille assumes that, if a hostile destination does not appear from the vessel's course, these papers are conclusive. (4) As to the mode of stopping and search, he lays down the rule that the cruiser must stop 'beyond the reach of cannon-ball;' [653] and says this is settled by 'international jurisprudence.' Neither the master nor any of the crew can be summoned on deck; and the search is confined to an examination of papers produced, and they are conclusive. (5) He seems to admit that, by force of the old international law, modified by treaties, a belligerent can take from a neutral vessel 'military persons . . . actually in the service of the enemy,' without making the vessel a prize, but no other persons. (6) 'In no case can these be contraband of war, if a neutral vessel is sailing between neutral ports.' (7) No carrying of despatches only for the enemy's government by a neutral, whatever their character or circumstances, can affect the neutral vessel, unless she is freighted expressly for the service of a belligerent government as a transport or packet.

Whatever argument may be made in favor of these propositions as suggestions for a new code, they do not, any of them, sound familiar to a student of international law as it is.

In order to present the points of law involved in the case of the Trent as abstractly as possible, every fact not necessary to their solution has, so far, been omitted. But the mode of the demand made, and the circumstances attending it, are important as illustrating international negotiations, and the duties and practice of leading nations in like cases. And perhaps the case derived its chief significance, at the time, from the political consequences it threatened, and the manner in which they were met and disposed of.

It is no uncommon thing in peace, and may be said to be a common thing in war, for the commander of some detached cruiser to do an act toward a neutral of doubtful legality, or even clearly inadmissible by the law of nations. If the party injured complains to his own government, the regular and proper course for a friendly power is to bring the act to the attention of the government of the offending vessel, assuming that it was not in pursuance of instructions, and will not be approved. Settlements of the acts of detached military officers are constantly made in this friendly and pacific manner. For a nation, on the mere hearing of one such detached act, to rush into war, or to throw itself into the attitude and menace of war, without waiting to hear from the government of the offending vessel, could not be accounted for upon the theory of friendly intentions.

In the latter part of November, 1861, the news reached London that a British steamer had been boarded by a United States sloop-of-war, and four persons, emissaries from the rebel government to Europe, taken from her. At first, the British journals were inclined to consider the act as within the outside limits of British precedents, though rather hard to submit to. But the British Government made it known that war was apprehended, hurried off a large military force to its American provinces, and made general and active preparations for war. 'Troops were despatched to Canada with all possible expedition, and that brave and loyal colony called out its militia and volunteers.'¹ Our dockyards resounded¹¹ with the din of workmen getting vessels fitted for sea: and there was but one feeling, which animated all classes and parties in the country; and that was a determination to vindicate our insulted honor, and uphold the inviolability of the national flag.' (British Annual Register, 1861, p. 254.)

Of course the agents of the rebels, and all their well-wishers, made the most of this feeling, to bring about a war; but the British people generally did not see, in the isolated act of a commander of a vessel, cause for so instant and peremptory a threat of war, and entertained no doubt that the government was in possession of information, [654] not made known to the public, which compelled them to this course, as a measure in anticipation of hostilities on the part of the United States. And such was the general belief. On the 30th November, Lord Russell

^[1] After volunteers a clause is omitted.]—G.G.W.

^[11] For dockyards resounded read dockyards here resounded.]—G.G.W.

delicto, and in the [648] actual prosecution of such a voyage, the penalty is not now generally held to attach.^(a) But the same learned judge

wrote to Lord Lyons, instructing him to demand of the United States 'such redress as would alone⁽¹⁾ satisfy the British nation; namely, the liberation of the four gentlemen,⁽¹¹⁾ and a suitable apology for the aggression which had⁽¹¹¹⁾ been committed.' Lord Lyons was instructed, 'Should Mr. Seward ask for delay, in order that this grave and painful matter should be deliberately considered, you will consent to a delay not exceeding seven days. If at the end of that time no answer is given, or if any other answer is given except that of a compliance with the demands of Her Majesty's Government, your lordship is instructed to leave Washington, with all the members of your legation, bringing with you the archives of the legation, and to repair immediately to London. You will communicate with Vice-Admiral Sir A. Milne immediately upon receiving the answer of the American Government; and you will send him a copy of that answer, together with such observations as you may think fit to make. You will also give all the information in your power to the governors of Canada, Nova Scotia, New Brunswick, Jamaica, Bermuda, and such other of Her Majesty's possessions as may be within your reach.'

It will be seen, that no proposal of arbitration or of further discussion, whatever might be the facts stated or reasons suggested by Mr. Seward, was to be received. It was instant and complete compliance by restoration and apology, or a breach,—indeed, it is as well to say plainly, or WAR.

At this time, the United States was straining its utmost efforts to subdue a rebellion of gigantic proportions. Its navy was not then sufficient to blockade the entire Southern coast, and its armies were slowly gathering from the people; and all, and more than all the forces collected were required for the civil war. It was well understood that the necessity of preparing to meet England at that moment, in even a probable or possible war by sea and land, would require the raising of the blockade, the withdrawal of a large part of our troops from the Southern frontier, and, substantially, the leaving of the Confederates to a *de facto* independence. A war, of course, made them the allies of England, and secured their recognition as a sovereignty.

This was the attitude in which the British Government placed itself on the 30th November, immediately upon hearing of the affair of the Trent, and before opportunity to hear a word from America. They did not suspect the act to have been in pursuance of instructions; for, in his letter to Lord Lyons, Earl Russell says, 'Her Majesty's Government are willing to believe that the United States naval officer who committed this aggression was not acting in compliance with any authority of his government.'

The news of the capture of Messrs. Mason and Slidell reached Washington about the same time that it reached London. On the same day (Nov. 30) that Lord Russell wrote his peremptory demand from London, Mr. Seward wrote from Washington to Mr. Adams a letter on other matters, in which he alluded to the arrival of Captain Wilkes, and says that he acted 'without any instructions from the government;' and adds, 'We have done nothing on the subject to anticipate the discussion;' and expresses the hope, that it will be 'met and disposed of in the spirit of humane and Christian nations.' On the same day (Dec. 19) that Lord Lyons read to Mr. Seward Earl Russell's demand, Mr. Adams read to Lord Russell the letter of Mr. Seward. [655] And, on the same day, Earl Russell, after hearing Mr. Seward's letter, writes to Lord Lyons that he understood Mr. Seward to 'affirm that no instructions were given to Captain Wilkes which authorized him to act in the manner he had done; neither had the United States Government committed itself with regard to any decision upon the character of that act, but waited for any representation the British Government might make before coming to any positive decision.'

From these singular coincidences of dates, each side acting without hearing from the other, it will be seen that there was nothing in this case which called for, or furnished an excuse for, a menace of war. It was the ordinary case of the act of a detached officer, not in pursuance of instructions, and not adopted, nor supposed to be adopted, by his country. Had the British Government had any reason to suppose otherwise, it would have been removed by the despatch of Mr. Seward of the 30th November; but that it did not suppose otherwise, appears from the passage in Earl Russell's first letter to Lord Lyons, just cited. The sudden preparation for

(a) The *Ionia*,^(1v) Robinson's Adm. Rep. iii. 168.

[¹ For would alone read alone would.]-G.G.W.

[¹¹ A *few* gentlemen a clause is omitted.]-G.G.W.

[¹¹¹ For had read has.]-G.G.W.

[^{1v} For *Ionia* read *Imina*.]-G.G.W.

applied a different rule in other cases of contraband, carried from Europe to [649] the East Indies, with false papers and false destination,

war in England created an alarm, as it spread wherever there were British possessions in the world, which would have been quieted had that government made known the substance of Mr. Seward's letter. But, on the other hand, its publication would have removed the only basis for the war-feeling in England,—viz., the belief that the act of Captain Wilkes was ordered or adopted by the American Government as an intentional insult to the British flag; and would have shown that the subject had always rested on the ordinary basis for friendly diplomatic correspondence. The British Government took the responsibility of withholding this intelligence; and diplomatic etiquette did not permit its publication by Mr. Adams in England. When rumors that such a letter had been received got abroad, a leading journal made what was understood to be a denial of the fact; and the British people were left to the suspicion, until after the news of the settlement reached them (which was the middle of January), that the act complained of was a national act predetermined or adopted, leaving no alternative for England but war or acquiescence. In the subsequent parliamentary debates, and by later writers in England, the government has been much censured for withholding this intelligence. But the truth seems to be, that, so long as they were uncertain whether their menace of war might not lead to war, they could not afford to withdraw the chief motive for the war-spirit in the British people, and to admit that their warlike demonstration had been needless. Their popular support depended upon a general belief in a necessity for their having accompanied their demand with the preparations and menace of war.

When the news of this demand and demonstration of war reached the United States, it caused great popular excitement. Had the United States been at peace, such a course of action would have been unaccountable, and reasons for it would have been sought. But, as things stood, it did not require actual war with England to compel the raising of the blockade, and the withdrawal of the chief part of the army from the South, thus effecting the success of the rebellion and the severance of the republic. The necessity of preparing for a probable war, was sufficient. The general belief that the course of the British Government was intended for that purpose, made the duty of the American Government as difficult of performance as possible; there being nothing statesmen more shun than the appearance of having acted under foreign menace. The President and Mr. Seward met the question with calmness, and decided it on principle; and Mr. Seward was able, in his letter, to [656] appeal at once to the pride and magnanimity of the people, by showing the act of surrender to be, in truth, a triumph of American international ideas over those formerly held by England, in the cause of neutral rights, by a decision against our own feelings and interests in the particular case. The result was soon acquiesced in as right, and, indeed, became a subject of gratulation. To follow further the effect of the course of the two governments upon the feeling of the two countries towards each other, would be entering upon political history.

A few days after Mr. Seward's letter to Lord Lyons, he had the satisfaction of offering to a part of the British forces despatched to Canada, in support of Lord Russell's demand, a transit through the State of Maine, from Portland, over the Grand Trunk Railroad, to save them 'the risk and suffering which might be feared, if they were left to make their way, in an inclement season, through the ice and snow of a northern Canadian voyage.' (Mr. Seward to the Governor of Maine, Jan. 17, 1862. Mr. Seward to Mr. Adams, Feb. 4, 1862.)

The Right of a Belligerent to take Noxious Persons from an Innocent Neutral Vessel. Although the United States disclaimed such a right, and the demand by Great Britain clearly renounced any such claim, the subject requires separate consideration. It does not raise a question of capturing the vessel for a violation of neutrality, but a right of the belligerent to take off such persons for his own benefit, without reference to the quality of the neutral's act, as being done intentionally, or in justifiable ignorance of the character of his passengers. Nor does it involve the right, once asserted by Great Britain, to take her own seamen from a neutral vessel; for that is not a belligerent right, but an exercise of police power for municipal purposes. The doubt on the question propounded arises chiefly from the fact that great numbers of treaties have provided that the persons of enemies shall not be taken from free ships, *unless they be military men in the actual service of the enemy*; seeming to imply, not only that the latter may be so taken, but also that, without this provision, any enemy could be so taken, whether a military man or not. The first trace of this provision is in a treaty of commerce between the

neutral could not lawfully engage in [664] that trade during war, upon the principle of what has been called the 'Rule of the War of 1756,' in its application to the colonial and coasting trade of an enemy not generally open in time of [665] peace. The court deemed it unnecessary to consider the principles on which that rule is rested by the British prize courts, not regarding them as applicable to the case in judgment. But the legality of the rule itself has always been contested by the American government, and it appears in its origin to have been founded upon very different principles from those which have more recently been urged in its defence. During the war of 1756, the French government, finding the trade with their colonies almost entirely cut off by the maritime superiority of Great Britain, relaxed their monopoly of that trade, and allowed the Dutch, then neutral, to [666] carry on the commerce between the mother-country and her colonies, under special licenses or passes, granted for this particular purpose, excluding, at the same time, all other neutrals from the same trade. Many Dutch vessels so employed were captured by the British cruisers, and, together with their cargoes, were condemned by the prize courts, upon the principle, that by such employment they were, in effect, incorporated into the French navigation, having adopted the commerce and character of the enemy, and identified themselves with his interests and purposes. They were, in the judgment of these courts, to be considered like transports in the enemy's service, and hence liable to capture and condemnation, upon the same principle with property condemned for carrying military persons or despatches. In these cases, the property was considered, *pro hac vice*, as enemy's property, as so completely

port to await adjudication upon them. In the seventeenth article of the treaty of 1800 between the United States and France, which expired in 1808, there is a provision, that, if the vessel boarded shall have contraband goods, and shall be willing to surrender them to the cruiser, she shall be permitted to pursue her voyage, unless the cruiser is unable to take them on board, in which case the vessel shall accompany her to port. This stipulation is common in the treaties between the United States and the other American republics. Hautefeuille contends for this as a right of a neutral by international law; by which, however, he means that it should be the neutral's right, by justice and reason, in the author's opinion. No national act in diplomacy, or based on adjudication, and independent of treaty, has been produced or suggested by the distinguished author, in affirmance of such a right. It is to be observed, that, as the captor must still take the cargo into port, and submit it to adjudication, and as the neutral carrier cannot bind the owner of the supposed contraband cargo not to claim it in court, the captor is entitled, for his protection, to the usual evidence of the ship's papers, and whatever other evidence induced him to make the capture, as well as to the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all these papers, and deliver them to the captor; and certainly the testimony of the persons on board cannot be taken at sea in the manner required by law. Such a provision may be applicable to a case where the owner of the goods, or a person capable of binding him, is on board, and assents to the arrangement, agreeing not to claim the goods in court; but not to a case where the owner is not bound. There may also be a doubt whether the ostensible owner or agent is really such; and so the captor may be misled. Indeed, a strong argument might be made from these considerations, that the article in the treaty can only be applied to a case where there is the capacity in the neutral vessel to insure the captor against a claim on the goods.]—D.

The American rule.
The Com-
mercen.

[650] § 507. Although the general policy of the American government, in its diplomatic negotiations, has aimed to limit the catalogue

presented important considerations. He argues that if this clause had appeared first in the nineteenth century, the inference would be that, at that time, the right to take the persons of enemies, not being soldiers in actual service, was, at least, so far matter of doubt as to require or justify its exclusion in terms; but that, as it had its origin some two hundred years ago,—when the authority and necessity of prize adjudications were not so well settled and understood as now, and the claims of belligerents to interdict neutral intercourse with their enemies, and neutral carrying-trade of persons and goods, were almost unlimited, and their practice loose and irregular, and their rights but little settled, and when the precaution was reasonable,—the fact that the clause has been copied out in later treaties, or rather not omitted, does not require the admission that the clause is now necessary, and that the law of nations would permit non-military persons to be so taken, as the law is now understood and acted upon between nations not parties to a treaty having such a preventive clause.

The question remains, How does the existence and history of this clause bear upon military persons in actual service found in neutral vessels?

It cannot be doubted, that, as between nations parties to such a treaty, it is admitted that a class of hostile persons, of a defined character and in a defined predicament, may be 'taken out'—'enlevés' 'tirés' 'avelli aut auferri'—from the neutral vessel. If nations have seen fit to continue these treaties, they must be held to intend the same meaning, and though, where doubtful, to be always construed in favor of liberty of persons and of neutrals, yet to be fairly construed towards the party involved in war. M. Hautefeuille, in his pamphlet on the Trent case, admits by implication, that, if Messrs. Mason and Slidell had been military persons, and so in actual service as to come within the terms of this clause, they could have been taken from the Trent, although the United States and Great Britain were not parties to such a treaty; for he considers, as M. Thouvenel in his letter to M. Mercier of Dec. 3, 1862, seems also to consider, that these treaties explain and exhibit the international law. *A fortiori*, these distinguished writers would admit the legality of the act between parties to such a treaty. (See also Hautefeuille, des Nat. Neutr. ii. 181.) The existence of this clause in treaties, at this time, is certainly an anomaly. It doubtless arose from the fact, that, when the clause was first used, two hundred years ago, and for some time afterwards, it was a common practice to take contraband goods from vessels without carrying the [658] vessels in for adjudication,—a practice to which the neutral carriers were often not averse, if they believed the goods contraband, as it saved them from delay and loss of a voyage; and hence the removing of hostile persons without adjudication, was not so abhorrent or strange. Between nations parties to such treaties, the only question would seem to be on the construction of the phrases, 'ducibus sive officialibus hostibus,'⁽¹⁾ 'gens de guerre, effectivement (or actuellement), en service (or au service) des ennemis,'—'soldiers in actual service of the enemy.' The disposition will be to restrict the effect of the phrases. Can it be confined to vessels which are in fault? There is no such implication in the language, nor in the history of the clause, nor in the reason of the thing. If the neutral is in fault, he comes into a different category; the vessel is no longer entitled to the privileges of neutrality, and is liable to capture and condemnation. The clause evidently does not look to prize proceedings, or to a waiver of such proceedings. It permits the doing of the simple act, either as a concession by convention, or as a reservation of a right from a larger class of prohibited acts. It does not include all military persons. There is the further requirement that they shall be in the actual service of the enemy. The construction would probably be, that the transit in question must be a part of their passage to or towards a port or scene of duty, at home or abroad, though not necessarily on an actual military expedition. Professor Bernard contributes the ingenious suggestion, that the clause does not say that it is lawful in every case to take out soldiers, but that it is not lawful in any case to take persons who are not soldiers.

How do the history and existence of this clause affect nations which have no such treaty between them? In view of the settled policy of nations to prohibit all acts of force on neutral vessels done at the discretion of the belligerent officer, and which look to no subsequent judicial determination, it may be safely predicted, that, if such a case should arise, it would be held that the law of nations could not be kept anchored to treaty provisions made two centuries ago, as protections against acts not then necessarily considered legal, but only probable or

[¹ For hostibus read hostilibus.]—G.G.W.

intended to conceal the real object of the expedition, where the return cargo, the proceeds of the outward cargo taken on the return voyage, was held liable to condemnation.^(b)²²⁹

Netherlands and Sweden of 1675. In a clause of that treaty, which secures freedom to carry enemy goods not contraband in neutral vessels, is the further provision that either party to the treaty may carry in their vessels the subjects of an enemy of the other party, and that they shall not be taken or forced therefrom unless they be military commanders or officials,—‘nec eos inde evelli⁽¹⁾ aut auferri licebit, exceptis tantum ducibus sive officialibus hostilibus.’ (Dumont, Corps Dipl. vii. 316.) It next appears in the treaty of Nimeguen in 1678, at the end of art. 22,—‘And, as it has been provided above that a free ship shall be free to carry her cargo, it is further agreed that this liberty shall extend also to persons who shall be found in a free ship, to the effect that although they be enemies of one or the other of the contracting parties, yet, when in a neutral vessel, they shall not be taken therefrom, provided they be not military persons, and effectively in the service of the enemy.’ This clause was copied into the treaty between Sweden and Holland of the next year; into the commercial treaty of Ryswick of 1697; into the treaties of Utrecht of 1713, between France and the Netherlands, and France and England; and into the treaty of 1739 between France and the United Provinces. The only change is, that ‘actuellement au service desdits ennemis’ is substituted for ‘effectivement en service,’ &c. This clause is also in the treaty between France and Hamburg of 1769.

This provision afterwards appears in the conventions between France and the [657] United States of 1778 and 1800, between the United States and Holland in 1782, between the United States and Sweden in 1783 and 1816, the United States and Prussia of 1785; the treaty between France and England of 1786, and between the United States and Spain of 1795 and 1819, and in the treaties of the United States with Colombia in 1824, Central America in 1825, Brazil in 1828, Mexico in 1831, Chili in 1832, Peru in 1851, Venezuela in 1836, and, in fact, with nearly if not all the South American States. In the French and English treaty of 1786 is added, after the words ‘actuellement au service desdits ennemis,’ the words, ‘et se transportant pour être employés comme militaires dans leurs flottes ou dans leurs armées’; and in the treaty between France and Hamburg of 1769, after the words ‘au service des ennemis,’ is added, ‘auquel cas, ils seront faits prisonniers de guerre.’ The clause does not exist in any form in any treaty between Great Britain and the United States. (D’Hauterive et de Cussy, tom. ii. 91, 104, 270; tom. iii. 445. Dumont, vii. i. 366, 440; ii. 389. United States Laws and Treaties, viii. passim.)

Upon the effect of these treaties, Professor Bernard (Case of the Trent, 14-20) has

(b) The *Rosalie* and *Betty*, Robinson’s Adm. Rep. ii. 343. The *Nancy*, Ib. iii. 122. The soundness of these last decisions may be well questioned; for, in order to sustain the penalty, there must be, on principle, a *delictum* at the moment of seizure. To subject the property to confiscation whilst the offence no longer continues, would be to extend it indefinitely, not only to the return voyage, but to all future cargoes of the vessel, which would thus never be purified from the contagion communicated by the contraband articles.

[²²⁹ Neither the *Rosalie* and *Betty*, nor the *Nancy*, to which the author refers, were decided on the ground of contraband. In the *Rosalie* and *Betty*, the court was inclined to the opinion that vessel and cargo were both enemy’s property, concealed as neutral; but, without positively so deciding, put the judgment on the ground that they were not proved to be property of the neutral claimants, and that the claimants had so involved their property with fraudulent concealments and hostile interests as to exclude them from further proof. The *Nancy* was decided on the ground that the claimants had been guilty of fraudulent, deceptive practices as to the outward passage to Batavia and the return passage, perhaps only to conceal the contraband character of the goods, and were not to be allowed further proof; and that the proofs of neutrality, as the case stood, were not satisfactory. In fact, these are both ordinary cases of unsatisfactory proof of neutral interests, and refusal of further proof by reason of fraudulent practices. In the *Nancy*, Sir W. Scott says that the voyage to Batavia and back was made by the parties one enterprise, one voyage, planned in Europe, and executed on the original plan, and on one system of concealment. But nothing in either case even tends to support the doctrine for which they are cited in the text.]—D.

[¹ For evelli read avelli.]—G.G.W.

during the late war between Great Britain and the United States, in which the Supreme Court of the [652] latter appears to have been disposed to adopt all the principles of Sir W. Scott, as to provisions be-

counterfeited seals.' These instructions from the Secretary of State to the Secretary of the Navy, of Oct. 31, 1862, were communicated to the ministers of foreign governments. (Dipl. Corr. 1863, Part I. p. 402.) In the case of the prize *Peterhoff*, in which the question was as to the actual ownership and destination of the cargo, the court at first directed the mails found on board to be opened in presence of the British Consul, and that he be requested to select such letters as appeared to him to relate to the cargo and its destination, and reserve the rest of the mail to forward to its destination. The British Consul refused to comply with this request, protesting that the mail should be forwarded unopened. On appeal to the Secretary of State, the United States Attorney at New York received directions to forward the entire mail to its destination unexamined, notwithstanding there was reason to believe some letters [660] in it would furnish evidence as to the cargo; and Mr. Seward wrote to Mr. Adams, April 21, 1863, to that effect; adding, 'I shall, however, improve the occasion to submit some views upon the general question of the immunities of public mails found on board of vessels visited under the belligerent right of search. The subject is one attended with⁽¹⁾ many embarrassments, while it is of great importance. The President believes it is not less desirable to Great Britain than it is to the United States, and other maritime powers, to arrive at some regulation that will at once save the mails of neutrals from unnecessary interruption and exposure, and, at the same time, prevent them from being made use of as auxiliaries to unlawful designs of irresponsible persons seeking to embroil friendly States in the calamities of war.'

The rule in Mr. Seward's instructions of 31st October, 1862, relates only to public mails duly authenticated; and the capturing government reserves the right to make sure of the genuineness of the authentication. When the vessel is a private one, but carrying mails under a government contract, like the *Cunard* or *Peninsula* and *Oriental* steamers, and the lines subsidized by the United States for that purpose, a government mail-agent is usually on board, having them in charge. Although this fact does not in law protect the mails from search, yet it affords opportunity for general arrangements between nations, and makes special arrangements between the captors and the mail-agent, in particular cases, more probable. No settled practice of nations has excepted public mails, carried in private vessels, from search made for the purpose of ascertaining the character, employment, destination, or ownership of that particular vessel or cargo, or for the purpose of ascertaining whether the vessel is acting as a carrier or despatch-boat in the service of the enemy's government. In principle and on authority, there is no such exemption. The belligerent may search the private vessel to see if she or her cargo, or any part of it, is, for any cause, lawful prize. The law allows immunity from search to no deposit of information. The danger of giving immunity from examination to the mails would be, not only that neutrals might so carry all contraband despatches for the enemy's government and in its service, without much danger of detection or prevention, but the actual papers and instructions of the ship and cargo would always be placed in its own mail, and only the ostensible ones be produced; and so the ship would not be obliged to incur even the slight risk and inconvenience of sending the real papers by a different conveyance. Moreover, there is, in fact, no public guaranty for the character of the contents of the mail. It is well understood that the postal officers usually know or notice little of the externals of the letters and packets in the mail, and know nothing of their contents. There is no rule by which governments undertake to be answerable for the neutral and innoxious character of the contents of the mails, or authorize or require their agents to make search beforehand, and to refuse objectionable matter. Moreover, it is settled that, in analogous cases, public neutral custody is not such a guaranty as will exclude belligerent search. Convoy by neutral ships of war does not exclude the visit and search of the convoyed vessels by the belligerent cruiser; and, in one case (the *Madison*, Edwards, 224), Sir W. Scott said, that, if papers are really of a character which neutrals ought not to carry, the fact that they were put on board by a neutral ambassador (not being within the immunity of diplomatic despatches) would not alter the case.

During the civil war in the United States, the British Government demanded that the United States should adopt the rule, that 'all mail-bags, clearly certified as⁽¹¹⁾ such, [661] shall

[¹ For with read by.]—G.G.W.

[¹¹ For as read to be.]—G.G.W.

coming contraband under certain circumstances. But as that was not the case of a cargo of *neutral* [653] property, supposed to be liable to capture and confiscation as contraband of war, but of a cargo of *enemy's* property going for the supply of the enemy's naval and military forces, and clearly liable [654] to condemnation, the question was, whether the neutral master was entitled to his freight, as in other cases of the transportation of innocent articles of enemy's property; and it was not essential to [655] the determination of the case to consider under what circumstances articles *ancipitis usus* might become contraband. Upon the actual question before the court, it seems there would have [656] been no difference of opinion among the American judges in the case of an ordinary war; all of them concurring in the principle, that a neutral, carrying supplies for the enemy's naval or military [657] forces, does, under the mildest interpretation of international law, expose himself to the loss of freight. But the case was that of a Swedish vessel, captured by an American cruiser, in the act [658] of carrying a cargo of British property, consisting of barley and oats, for the supply of the allied armies in the Spanish peninsula, the United States being at war with Great Britain, but at peace [659] with Sweden and the other powers allied against France. Under these circumstances a majority of the judges were of the opinion that the voyage was illegal, and that the neutral carrier was [660] not entitled to his freight on the cargo condemned as enemy's property.

It was stated in the judgment of the court, that it had been [661] solemnly adjudged in the British prize courts, that being engaged in the transport service of the enemy, or in the conveyance of military persons in his employment, or the carrying of despatches, are acts of hostility which subject the property to confiscation. In these cases, the fact that the voyage was to a neutral port was not thought to change

be exempt from seizure and visitation.' (Mr. Stuart to Mr. Seward, Oct. 29, 1862.) The letter adds: 'If this principle is admitted, the necessity of discussing the question, as matter of strict right, that Her Majesty's mails on board a private vessel should be exempted from visitation and detention, might be avoided.' Two days afterwards, Mr. Seward issued the instructions to the Navy Department referred to above. This exempts from search 'public mails of any neutral or friendly power, duly certified or authenticated as such,' with the proviso that the instructions shall not 'be deemed to protect simulated mails verified by forged certificates and counterfeit⁽¹⁾ seals.' The exemption was not admitted as of strict right, but conceded on grounds of policy and comity. It seems to have left the matter thus: If the ostensible authentication turns out to be false, there has been no violation of the conceded immunity; if it turns out to be genuine, any examination in the nature of a search is a violation of that immunity. The searcher takes the risk, and his government the consequences. It is like the case of the stopping and visiting of an ostensible foreign merchantman by a cruiser, in time of peace, on suspicion that she is a pirate, or is a vessel of the cruiser's own country under false colors, engaged in the violation of municipal law. If the ostensible national character turns out real, the cruiser is *in delicto*, and his government is *in misericordiâ*. Mr. Seward's letter of April 21, 1863, proposing some general regulation on the subject of the immunity of public mails, does not seem to have been followed by any results.]—D.

[¹ *For* and counterfeit *read* or counterfeited.]—G.G.W.

the character of the transaction. The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the enemy State, and to assist in warding off the pressure of the war, or in favoring its offensive projects. Now these cases could not be distinguished, in principle, from that before the court. Here was a cargo of provisions exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination, they would not have been permitted to be exported at all. It was vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy indirectly to operate with more vigor and promptitude against them, and increase his disposable force. But it was not the effect of the particular transaction which the law regards: it was the general tendency of such transactions to assist the military operations of the enemy, and to tempt deviations from strict neutrality. The destination to a neutral port could not vary the application of this rule. It was only doing that indirectly, which was directly prohibited. Would it be contended that a neutral [662] might lawfully transport provisions for the British fleet and army, while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might lawfully supply a British fleet stationed on the American coast? An attempt had been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the ground that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms in respect to the former, though not to the latter. But the court held, that whatever might be the right of the Swedish sovereign, acting under his own authority, if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It was perfectly immaterial in what particular enterprise those armies might, at the time, be engaged; for the same important benefits were conferred upon the enemy of the United States, who thereby acquired a greater disposable force to bring into action against them. In *The Friendship*, (6 Rob. 420,) Sir W. Scott, speaking on this subject, declared, that 'it signifies nothing, whether the men so conveyed are to be put into action on an immediate expedition or not. The mere shifting of draughts in detachments, and *the conveyance of stores* from one place to another, is an ordinary employment of a transport vessel,⁽¹⁾ and it is a distinction totally unimportant whether this or that case may be connected with the *immediate active* service of the enemy. In removing forces from distant settlements, there may be no intention

[¹ For a transport vessel *read* transport vessels.]—G.G.W.

of immediate action; but still the general importance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels.' It was obvious that the learned judge did not deem it material to what places the stores might be destined; and it must be equally immaterial, what is the immediate occupation of the enemy's force. That force was always hostile to America, be it where it might. To-day it might act against France, to-morrow against the former country; and the better its commissary department was supplied, the more life and activity was communicated to all its motions. It was not therefore material whether there was another distinct war, in which the enemy of the United States [663] was engaged, or not. It was sufficient, that his armies were everywhere their enemies; and every assistance offered to them must, directly or indirectly, operate to their injury.

The court was, therefore, of opinion that the voyage in which the vessel was engaged was illicit, and inconsistent with the duties of neutrality, and that it was a very lenient administration of justice to confine the penalty to a mere denial of freight.^(a)²³⁰

(a) The Commercen, Wheaton's Rep. i. 382.

[²³⁰ *Penalty for Carrying Contraband*.—It would seem that neutral vessels carrying contraband were, in early times, treated as wrong-doers, and deemed subject to forfeiture. (Jonge Tobias, Rob. i. 330. Atalanta, Rob. vi. 440. Ringende Jacob, Rob. i. 90. Kent's Comm. i. 146.⁽¹⁾ Bynkershoek, Quaest. Jur. Pub. cap. 12-14. Phillimore's Intern. Law. iii. 571.) Some relics of this practice remain. If the contraband cargo belongs to the owner of the vessel, the vessel is condemned. So, if the neutral vessel is bound by a treaty of her own country to abstain from the act in question, the vessel is condemned for the act, though the cargo be not the property of the owner of the vessel. In the absence of a treaty, on what principle can it be said that a neutral may carry contraband goods of another person without penalty on his vessel, but cannot carry his own? One act is as injurious to belligerents as the other. I hazard the conjecture that this rule arose out of a state of things where the knowledge of the carrier was or was thought to be important as determining the fate of his vessel, and he was held conclusively bound to know the character and destination of his own goods; and that the rule, once established, survived the reason which caused it. This consequence to the owner of the vessel and cargo was prohibited in the treaty between the United States and France, of 1800, art. 13, now expired. By the present practice of nations, if the neutral has done no more than carry goods for another which are in law contraband, the only penalty upon him is the loss of his freight, time, and expenses. If he makes use of fraudulent devices to mislead the belligerent, and defeat or impair the right of search, he is liable to condemnation, for unneutral acts in aid of the enemy. So, if he not only carries contraband goods, but engages in a contraband service. We have seen (Note 228, *ante*, on Carrying Hostile Persons or Papers), that, if a neutral lets his vessel to a belligerent government, it is immaterial what she is carrying, or whether she be in ballast, or what are the *termini* of her voyage; for she is in the enemy's service, and liable to be condemned as *pro hac vice* enemy's property. But, if she has no relations with the enemy's government, and, as a private merchant-vessel, is carrying goods on private account, as merchandise, to the enemy's ports, to be put into the market there, or delivered into private hands, she is not, as the practice is now settled, liable to condemnation, whatever be the character of her cargo. It may be gunpowder, or provisions destined to a port hard pressed by siege. Her object is commercial; and the adapting of her cargo to the demands of its port of destination is allowed now to be a fair commercial enterprise. The probability,

[¹ For 146 read 143.]—G.G.W.

Rule of the
war of 1756.

§ 508. It had been contended in argument in the above case, that the exportation of grain from Ireland being generally prohibited, a

however great, that the gunpowder will at once or at last come into the hands of the enemy's government, or be otherwise used in war, and the chance that the provisions, whether they go into government hands or not, may enable the inhabitants the longer to support the [664] siege,—none of these considerations make the enterprise contraband. The reason for the rule is that the capital and industry of the world are deeply and permanently involved in making, raising, and transporting for sale or consumption all articles, whether usable in war or not: and articles which all courts, treaties, and writers admit to be always contraband when destined to an enemy's port, are still also articles of utility and even necessity in peace; and in their production and transportation the capital and industry of the world are permanently involved. Gunpowder, for instance, smaller fire-arms, and even cannon, are necessary for peaceful purposes; and, if from these extreme instances, we pass through the scarcely distinguishable degrees of articles *ancipitis usus*, it becomes apparent how strong and general is the motive for resisting restrictions upon this trade. The interests of peace and commerce, on the one hand, and those of war, on the other, have, in the conflict of their forces, rested at a practical line of settlement. The interests of peace have prevailed so far as to permit the carrier to transport contraband goods, subject to no other penalty than the loss of his commercial enterprise,—*i.e.*, his freight and expenses; while the interests of war have prevailed so far as to permit the belligerent to stop the contraband goods on their passage, and convert them to his own use. The advantage of this is, that the carrying-trade of the world may go on, subject to an ascertainable risk, which may be provided for by contract, and guarded against by insurance; and producers and merchants can continue their business and procure transportation without criminality, taking the risk of the capture and condemnation of noxious articles. At the same time, the belligerents have the further security of being able to condemn all the interests involved, whether vessel or cargo, if there have been fraudulent practices, or hostile service.

If the act of the neutral carrier amounts to a hostile service, his vessel is liable to condemnation; and his act is not to be retained within the category of contraband simply because it consisted in carrying contraband goods. The *Commercen* (Wheaton's Rep. i. 382) might have presented this question satisfactorily, but for an error in the court below. The vessel was neutral, and was carrying a cargo of wheat from Cork, to be delivered to the British fleet, lying in a neutral port in Spain. She was not let to the British Government for the purpose; and it does not appear at what stage that government became, or was to become, interested in the cargo, as owner. The shipper was probably a contractor for supplying the fleet. Exportation of wheat was prohibited at that time; and the shipper obtained special permission, giving bond for its due delivery to the fleet. The vessel was captured by an American privateer; and, in the prize court below, for some unexplained reason, the case was treated simply as one of enemy's goods in a neutral's vessel. The goods were condemned as enemy's property; and the vessel was restored, but without freight. The owner of the vessel appealed from the denial of freight; and it was upon that point only that the case came before the Supreme Court. That court had no difficulty in finding the cargo contraband, under the circumstances; and that alone required a confirmation of the decree. There seems to have been no attempt in the court below to procure a condemnation of the vessel for being engaged in a hostile service; and the record did not present that point to the Supreme Court. Had it been presented, there would seem little doubt that the service, under all its circumstances, might be considered as hostile, and the vessel as *pro hac vice* in the employment of the enemy's government. The fact that the British fleet lay in a neutral port was immaterial. Indeed, it is a confusion [665] of ideas to apply the doctrines of continuous voyages and neutral *termini*, to cases of service performed for an enemy.

(On the penalty for contraband and its reasons, see further Hautefeuille, *Des Nat. Neutr.* tom. iii. pp. 224–234. Ortolan, *Règl. Intern.* tom. ii. liv. iii. p. 187.)

There is a French *règlement* of Louis XVI. of 26th July, 1778, which condemns the vessel and cargo, if three-fourths of the cargo in value is contraband. But, as this is in derogation of the international law as now settled, it cannot be enforced against neutrals.

TAKING CONTRABAND GOODS OUT OF NEUTRAL VESSELS. It is for the interest of the neutral carrier, if he knows that the goods claimed by the visiting cruiser are contraband, to give them up, and be permitted to go on his way, rather than to be carried into the belligerent's

neutral could not lawfully engage in [664] that trade during war, upon the principle of what has been called the 'Rule of the War of 1756,' in its application to the colonial and coasting trade of an enemy not generally open in time of [665] peace. The court deemed it unnecessary to consider the principles on which that rule is rested by the British prize courts, not regarding them as applicable to the case in judgment. But the legality of the rule itself has always been contested by the American government, and it appears in its origin to have been founded upon very different principles from those which have more recently been urged in its defence. During the war of 1756, the French government, finding the trade with their colonies almost entirely cut off by the maritime superiority of Great Britain, relaxed their monopoly of that trade, and allowed the Dutch, then neutral, to [666] carry on the commerce between the mother-country and her colonies, under special licenses or passes, granted for this particular purpose, excluding, at the same time, all other neutrals from the same trade. Many Dutch vessels so employed were captured by the British cruisers, and, together with their cargoes, were condemned by the prize courts, upon the principle, that by such employment they were, in effect, incorporated into the French navigation, having adopted the commerce and character of the enemy, and identified themselves with his interests and purposes. They were, in the judgment of these courts, to be considered like transports in the enemy's service, and hence liable to capture and condemnation, upon the same principle with property condemned for carrying military persons or despatches. In these cases, the property was considered, *pro hac vice*, as enemy's property, as so completely

port to await adjudication upon them. In the seventeenth article of the treaty of 1800 between the United States and France, which expired in 1808, there is a provision, that, if the vessel boarded shall have contraband goods, and shall be willing to surrender them to the cruiser, she shall be permitted to pursue her voyage, unless the cruiser is unable to take them on board, in which case the vessel shall accompany her to port. This stipulation is common in the treaties between the United States and the other American republics. Hautefeuille contends for this as a right of a neutral by international law; by which, however, he means that it should be the neutral's right, by justice and reason, in the author's opinion. No national act in diplomacy, or based on adjudication, and independent of treaty, has been produced or suggested by the distinguished author, in affirmance of such a right. It is to be observed, that, as the captor must still take the cargo into port, and submit it to adjudication, and as the neutral carrier cannot bind the owner of the supposed contraband cargo not to claim it in court, the captor is entitled, for his protection, to the usual evidence of the ship's papers, and whatever other evidence induced him to make the capture, as well as to the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all these papers, and deliver them to the captor; and certainly the testimony of the persons on board cannot be taken at sea in the manner required by law. Such a provision may be applicable to a case where the owner of the goods, or a person capable of binding him, is on board, and assents to the arrangement, agreeing not to claim the goods in court; but not to a case where the owner is not bound. There may also be a doubt whether the ostensible owner or agent is really such; and so the captor may be misled. Indeed, a strong argument might be made from these considerations, that the article in the treaty can only be applied to a case where there is the capacity in the neutral vessel to insure the captor against a claim on the goods.]—D.

identified with his interests as to acquire a hostile character. So, where a neutral is engaged in a trade, which is exclusively confined to the subjects of any country, in peace and in war, and is interdicted to all others, and cannot at any time be avowedly carried on in the name of a foreigner, such a trade is considered so entirely national, that it must follow the hostile situation of the country.^(a) There is all the difference between this principle and the more modern doctrine which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the opposite belligerent, protecting their property from capture in a particular trade which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause of confiscation, whilst the latter has never been deemed to have such an effect. The 'Rule of the War of 1756' was originally founded upon the former principle: it was suffered to lie dormant during the war of the American Revolution; and when revived at the commencement of the war against France in 1793, was applied, with various relaxations and modifications, to the prohibition of all neutral traffic with the colonies and upon the coasts of the enemy. The principle of the rule was frequently vindicated by Sir W. Scott, in his masterly judgments in the High Court of Admiralty and in the [667] writings of other British public jurists of great learning and ability. But the conclusiveness of their reasonings was ably contested by different American statesmen, and failed to procure the acquiescence of neutral powers in this prohibition of their trade with the enemy's colonies. The question continued a fruitful source of contention between Great Britain and those powers, until they became her allies or enemies at the close of the war; but its practical importance will probably be hereafter much diminished by the revolution which has since taken place in the colonial system of Europe.^(b)²³¹

(a) *The Princessa*, Robinson's Adm. Rep. ii. 52. *The Anna Catharina*, Ibid. iv. 118. *The Rendsborg*, Ibid. 121. *The Vrow Anna Catharina*, Ibid. v. 150.⁽¹⁾ *Wheaton's Rep.* ii. Appendix, 29.

(b) *Wheaton's Rep.* i. Appendix, Note III. See Madison's 'Examination of the British Doctrine which subjects to Capture a Neutral Trade not Open in Time of Peace.'

^[231] *Continuous Voyages*.—The examination into the continuous nature of voyages is, or may be necessary in reference alike to blockade, trade with enemies, unneutral service, and carrying contraband, and, indeed, to all cases where the destination of the vessel or cargo is material. The right of the belligerent is to know the facts. The policy of the neutral is to conceal them. If the destination is really to a hostile port,—if that is the plan or scheme of the voyage,—it is, of course, immaterial what formal acts, intended to deceive, are interposed. If the plan of the voyage is, that the cargo be landed in a neutral port, and thence transhipped to its actual destination, it is to be expected that the neutral, whose object is to deceive, will be careful to go through all the forms which would be gone through with for a cargo actually destined to that neutral port. His object is to assimilate all the acts of a fictitious destination to those of a real destination. Such a cargo will be furnished with bills of lading and invoices,

[¹ For 150 read 161.]—G.G.W.

[668] § 509. Another exception to the general freedom of neutral commerce in time of war, is to be found in the trade to ports or places besieged or blockaded by one of the belligerent powers.

Breach of
blockade.
Grotius and
Bynkershoek.

letters of instruction to the master or supercargo, and to the consignee in the neutral port,—all ostensibly contemplating an actual termination of the commercial enterprise there. That may be as well assumed, as it would be assumed that a spy would have not only no signs of his real character about him, but all the usual badges of an opposite character. The shipper may actually intend to have the goods landed in the neutral port, and stored there, and the employment of the vessel may cease there; and the mode, means, and time of transshipment to the real port of destination may be either planned by the shipper or left entirely to the discretion of his agent, and even a sale may be gone through with. All these facts are merely evidential, and consistent alike with an honest and a fraudulent intent. If a real hostile destination is proved *aliunde*, they make the fraudulent character of the scheme the more incontrovertible, while, if a hostile destination is disproved, they are natural and proper. It is the duty of the prize court to sift thoroughly all the facts, and detect the fraud if it exists; none of them having any conclusive and defined legal effect attached to them.

With reference to cargo landed at the neutral port, and a sale made there, Sir William Scott puts the test, whether the cargo, at that place, is 'imported into the common stock of the country.' (*Thomyris*, Edwards, 17. *Maria*, Rob. v. 365. *William*, Ibid. v. 385.) If, all the while, the consignee is merely an agent and bailee, whose office is to hold the goods for a greater or less time, and go through with more or less ceremonies over them, and ultimately to transship them to their real destination, with or without discretion in him or some one else as to the time and mode of transshipment, the hostile destination remains impressed on the goods; and they are all the while *in itinere*. If the form only of sale is gone through with, it is adding so much [668] to the fraud. But the transfer of title may be actual; still, if the original destination is superior to the transfer and overrides it, or if the transfer is consistent with the plan of hostile destination originated and carried out, the mere change of ownership is a fact immaterial to the captor. The modes of accommodating an actual sale at a neutral port to the hostile destination may be numerous. As instances of it, are an original contract by the shipper to sell at the neutral port, deliverable by him at the enemy's port; or a contract of sale made first at the neutral port, with a transfer of title there, but subject to the original destination and delivery at the hostile port. Such a transfer of general title is of no more consequence to the captor than a change of interest by death or insolvency of the shipper. But a sale is not necessary to create an importation into the common stock of the country. If the goods are to take their chances of the future, and to be retained there or consumed there, or transshipped to some other country, whether an enemy's or a neutral's, as may prove expedient, controlled by no original plan of hostile destination, no change of ownership need be made. (On the general subject of continuity of voyages, see Kent's Comm. i. 84, and note *a*. Opinions of Attorney-General, i. 359-362, 394-396.^[1] Halleck's Intern. Law. *The Polly*, Rob. ii. 361. *Essex*, Ibid. v. 365.^[11] *Maria*, Ibid. v. 367. *William*, Ibid. v. 349.^[111] *Thomyris*, Edw. 17. *Matchless*, Hagg. i. 97. *Eliza Ann*, Ibid. i. 259. *Imina*, Rob. iii. 167. *Charlotte*, Ibid. vi. 382.^[1v] *Margaret*, Acton, i. 333. *Richmond*, Rob. v. 325. *Two Nancies*, Ibid. ii. and iii. 122.^[v] *The Baltic*, Acton, i. 25. *Rosalie* and *Betty*, Rob. ii. 343. *Mentor*, Edw. 207. *Franklin*, Rob. iii. 217. *James Cook*, Edw. 261. *Liverpool Packet*, Gallison, i. 526. *Mary*, Cranch, ix. 126.)

It is not necessary that the goods be sent from a neutral port. The rule of contraband is the same, if they are transported from one port of the enemy to another. (Halleck, 575. *Heffter*, § 161. *Wildman*, ii. 211. *The Edward*, Rob. iv. 70.)

Examinations into continuity of voyages occur chiefly where a subject of the capturing power is supposed to be trading with the enemy, or a neutral to be sending contraband goods to the enemy, or under what is called the 'Rule of 1756,' explained at large in the text. It also becomes important in case of suspicion of an intent to break blockade. If a cargo is destined

[¹ The reference 'Opinions of Attorney-General, i. 359-362, 394-396' is to 'H. Ex. Doc. 123, 26th Cong. 2d sess. Opinions of the Attorneys General.'—G.G.W.]

[¹¹ For 365 read 368.]—G.G.W.

[¹¹¹ For 349 read 385.]—G.G.W.

[^{1v} For 382 read 386.]—G.G.W.

[^v For *Two Nancies*, Ibid. ii. and iii. 122 read *The Nancy*, Ibid. iii. 82; *The Nancy*, Ibid. 122.]—G.G.W.

[669] The more ancient text-writers all require that the siege or blockade should actually exist, and be carried on by an adequate force, and not merely declared by proclamation, in order to render commercial intercourse with the port or place unlawful on the part of neutrals. Thus Grotius forbids the carrying any thing to besieged or blockaded places, 'if it might impede the execution of the belligerent's lawful designs, and if the carriers might have known of the siege or blockade; as in the case of a town actually invested, or a port closely blockaded, and when a surrender or peace is already expected to take

to be carried through blockade, it can be captured at any stage of the voyage. A neutral destination will often be interposed in such case, with all the ceremonies of landing, transshipping, sale, &c., as in the case of contraband; and the same tests and principles of reasoning apply to both. This subject has been fully and ably treated by Mr. Harcourt [Historicus] in his pamphlet on the Nassau trade, published in 1863, pp. 33-40. If the only objection to the cargo be, its destination to be carried through blockade, it is not enough to show that it was destined ultimately for a blockaded place, if it was to be landed at a port not blockaded, whether an enemy's or neutral, and carried thence by land to the blockaded port; for, in that case, there is not an intent to carry the cargo through the blockade. (*The Staat*,^[1] Rob. iv. 65. Jonge Pieter, *Ibid.* iv. 79. Ocean, *Ibid.* iii. 297.) In these cases, it was held, that where a harbor of a city is blockaded by sea, it is not a breach of blockade to send goods to or from that city by a canal navigation which has a separate access to the sea, if that access is not itself under effective blockade.

But, if a cargo destined from the blockaded city is sent through the blockade in lighters to a vessel in a port not under blockade, and is captured in that vessel on its way to its destination, there has been a breach of blockade. It is one voyage and one [669] transaction. (*The Maria*, Rob. vi. 201. *Charlotte Sophia*, *Ibid.* 204, note. *Lisette*, *Ibid.* 394.) The same rule would apply to a cargo destined to such a city, intended to be landed at a near port not under blockade, and to be sent through the blockade in lighters. But, if the cargo is destined to the city, and the vessel is to be run on shore, and the cargo landed and sent to the city by land-carriage there, it would not be an attempt to break blockade, unless the blockade effectively extended over the place where the cargo is to be run ashore.

In exercising the search into the continuity of the voyage, if it appears that the carrier did not know of any destination of the cargo beyond that of the neutral port, and that his ignorance was excusable, he does not lose his freight and expenses. (*Ebenezer*, Rob. vi. 256.)

If the vessel is to deliver a contraband cargo into the hands and control of the enemy's government or of its executive officers, that makes the destination hostile, whether the place of delivery be at sea, or in a neutral or a hostile port. *The Commercen*, Wheaton, i. 382.

Even in cases of trading with the enemy by subjects of the capturing power, or of intended breach of blockade, or of contraband cargo, the fact that the place of the final and *bonâ fide* destination of the vessel is a neutral port, has no conclusive legal effect attached to it. The question is, the destination of the cargo; and the destination of the vessel is only an evidential fact, of more or less weight, under the circumstances of each case. If the cargo has a hostile destination, and the vessel has only a neutral one, and is excusably ignorant of that of the cargo, the consequence is that it does not lose freight and expenses; but it does lose them if it is cognizant of that destination, and is knowingly aiding it by carrying the cargo over one stage, though between neutral ports. Destination to an enemy's ship is a hostile destination. (*Commercen*, Wheaton, i. p. 382. *Lord Wellington*, Gallison, ii. 104.^[11]) If it is sought to condemn a vessel for being engaged in the service of the belligerent government by knowingly transporting troops or military persons or munitions of war, or verbal or written orders or messages, or persons charged with such orders or messages, the *termini* of the vessel's voyage are also immaterial, except as throwing light on the question of the knowledge of the vessel, or of its obligations to make inquiries and satisfy itself.]—D.

[¹ For *Staat* read *Stert.*]—G.G.W.

[¹¹ For 104 read 103.]—G.G.W.

place.'(a) And Bynkershoek, in commenting upon this passage, holds it to be 'unlawful to carry any thing, whether contraband or not, to a place thus circumstanced; since those who are within may be compelled to surren[670]der, not merely by the direct application of force, but also by the want of provisions and other necessities. If, therefore, it should be lawful to carry to them what they are in need of, the bel-ligerent might thereby be compelled to raise the siege or blockade, which would be doing him an injury, and therefore unjust. And because it cannot be known what articles the besieged may want, the law forbids, in general terms, carrying *any thing* to them; otherwise disputes and altercations would arise to which there would be no end.'

§ 510. Bynkershoek appears to have mistaken the true sense of the above-cited passage from Grotius, in supposing that the latter meant to require, as a necessary ingredient in a strict blockade, that there should be an expectation of peace or of a surrender, when, in fact, he merely mentions that as an example, by way of putting the strongest possible case. But that he concurred with Grotius in requiring a strict and actual siege or blockade, such as where a town is actually invested with troops, or a port closely blockaded by ships of war, (*oppidum obsessum, portus clausos*), is evident from his subsequent remarks in the same chapter, upon the decrees of the States-General against those who should carry any thing to the Spanish camp, the same not being then actually besieged. He holds the decrees to be perfectly justifiable, so far as they prohibited the carrying of contraband of war to the enemy's camp; 'but, as to other things, whether they were or were not lawfully prohibited, depends entirely upon the circumstance of the place being besieged or not.' So, also, in commenting upon the decree of the States-General of the 26th June, 1630, declaring the ports of Flanders in a state of blockade, he states that this decree was, for some time, not carried into execution, by the actual presence of a sufficient naval force,

Bynkers-
hoek on be-
sieged and
blockaded
ports.

(a) 'Si⁽¹⁾ juris mei executionem rerum subvectio impediret,⁽¹¹⁾ idque scire potuerit qui ad-
vexit, ut si OPPIDUM OBSESSUM TENEBAM, si PORTUS CLAUSOS, et jam deditio aut pax expecta-
batur,' &c. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. i, § 5, note⁽¹¹⁾ 3.

(b) 'Sola obsidio in causâ est, car^(1v) nihil obsessis subvehere liceat, sive contrabandum sit, sive non sit, nam obsessi non tantum vi coguntur ad deditionem, sed et fame, et aliâ aliarum rerum penuriâ. Si quid eorum, quibus indigeat,^(v) tibi adferre liceret, ego fortè cogerer obsidionem solvere, et sic facto tuo mihi noceres, quod iniquum est. Quia autem sciri nequit, quibus rebus obsessi indigeant, quibus abundant, omnis subvectio vetita est, alioquin altercationum nullus omnino esset modus vel finis. Hactenus Grotii sententiæ accedo, sed vellem ne ibidem addidisset, tunc demum id verum esse, si jam deditio aut pax expectabatur, . . . nam nec rationi conveniunt, nec pactis Gentium, quæ mihi succurrerunt. Quæ ratio me arbitrum constituit de futurâ deditione aut pace? et, si neutra expectetur, jam licebit obsessis quælibet advehere? imo nunquam licet, durante obsidione, et amici non est causam amici perdere, vel quoque^(v1) modo deteriorem facere.' Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 11.^(v11)

[¹ For Si read . . . si.]—G.G.W.

[¹¹¹ For note read paragraph.]—G.G.W.

[^v For indigeat read indigeant.]—G.G.W.

[^{v11} For 11 read xi.]—G.G.W.

[¹¹ For impediret read impedierit.]—G.G.W.

[^{1v} For car read cur.]—G.G.W.

[^{v1} For quoque read quoquo.]—G.G.W.

during [671] which period certain neutral vessels trading to those ports were captured by the Dutch cruisers; and that part of their cargoes only which consisted of contraband articles was condemned, whilst the residue was released with the vessels. 'It has been asked,' says he, 'by what law the contraband goods were condemned under those circumstances, and there are those who deny the legality of their condemnation. It is evident, however, that whilst those coasts were guarded in a lax or remiss manner, the law of blockade, by which all neutral goods going to or coming from a blockaded port may be lawfully captured, might also have been relaxed; but not so the general law of war, by which contraband goods, when carried to an enemy's port, even though not blockaded, are liable to confiscation.'^(a)²³²

(a) Wheaton's Hist. Law of Nations, 138-143.

^[232] *Commercial Blockades.*—Efforts have been made during this century to prohibit what are called purely *commercial blockades*. These are understood to be blockades of commercial towns, not being naval stations or military posts, instituted for the purpose of merely closing them against commerce, and not as a part of warlike operations directed to the capture of the place, or its actual investment or siege. Blockades of the latter description may be called, for convenience, and in the absence of any settled term, *military or strategic blockades*. The efforts in this direction came chiefly from the United States, until the civil war of 1861-5, when they established the largest commercial blockade ever known, and carried it out with extraordinary success. It extended from the Potomac to the Rio Grande, both on the Atlantic coast and in the Gulf of Mexico, over a stretch of upwards of three thousand miles. Except at Charleston, the blockading force made no attempts to reduce the cities blockaded. Not more than one of the ports, and that only for a part of the time, was a naval station of the enemy; and none of them were military or fortified towns, unless every town is such, which is defended at all; and none of the ports, except Charleston, and, for a short time, one or two others, were subjects of direct military operations looking to their siege or reduction. This vast blockade, for four years, was purely commercial. The great aid it contributed toward the diminution of the resources of the enemy, their exhaustion and final surrender, and the now generally-recognized necessity for it, have doubtless been instructive to America and the rest of the world. It has shown that there may be wars in which such a blockade may be extremely useful, if not necessary. At the same time, it has shown that a blockade, commercial in its immediate action, may be a necessary part of a large system of military strategy in its more remote relations. The strategy was, to surround the entire rebel territory by sea and land, force it in upon itself, reducing its proportions and resources, and making advances into its interior, from the sea-coast or by land, at such points as should be selected. The blockade of the entire coast did not only cut off commerce and shut in the naval force of the enemy, but compelled them to maintain military forces to defend ports from possible attacks by the ships, so diverting their strength from the immediate scenes of operations by the armies.

Although the United States, before 1861, had made efforts toward a prohibition of commercial blockades, they never questioned their legality under the law of nations.

Mr. Cass, Secretary of State, in his letter to Mr. Mason, June 27, 1859, speaks of [672] the right to maintain such blockades as 'a claim which gains no additional strength by an investigation into the foundation on which it rests,' and adds that 'the evils which have accompanied its exercise call for an efficient remedy.' The distinction he attempts to draw is thus stated: 'The investment of a place by sea and land with a view to its reduction, preventing it from receiving supplies of men and material necessary for its defence, is a legitimate mode of prosecuting hostilities. But the blockade of a coast, or of commercial positions along it, without any regard to ulterior military operations, and with the real design of carrying on a war against trade, and, from its very nature, against the trade of peaceful and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or with the opinions of modern times. To watch every creek and river upon an ocean frontier, in order to seize and confiscate every vessel, with its cargo, attempting to enter or go out, without any

[672] § 511. 'To constitute a violation of blockade,' says Sir W. Scott, 'three things must be proved: 1st, The existence of an actual

What things must be proved to constitute a violation of blockade.

direct effect upon the true objects of the war, is a mode of hostilities which would find few advocates if now first presented for consideration.'

Lord John Russell, in a speech of February, 1861, characterizes this as 'a proposal that, there being two powers, one of which has a very strong army and a weak navy, and the other an inferior army but a superior navy, the latter power should forego its advantages, and allow the contest to be decided by military force only.'

The definition offered by Mr. Cass is perhaps as good as can be expected; but it shows the difficulty of any practical test between blockades that may be, and may not be permitted, under the proposed declaration. What is meant by a blockade 'without any regard to ulterior military operations'? What is meant by the implication that a war should be only 'against armed men'? How far is it true that a blockade to cut off trade is 'without any direct effect on the true objects of the war'? What is 'the investment of a place by sea and land, with a view to its immediate reduction, and preventing it from receiving supplies of men or material necessary for its defence,' as distinguished from such a blockade as the United States maintained in 1861-5, where our object was to cut off supplies of men and materials necessary for the general defence, and where there was a general view to the reduction of the particular place by a general strategic system? In fact, we think it will be found difficult to establish a practical test between the proposed permitted and unpermitted blockades, in many cases. During a large part of the French war, the English blockades were purely commercial, except those of Toulon and other naval stations, as they were no part of an immediate military invasion of France; nor was there any attempt or intent to capture and hold the blockaded places, or to besiege or invest them. But most wars will present complex cases of military operations against a country; invading armies, having a view to the ultimate reduction of every town, if necessary; and operations by fleets, having in view co-operation with the armies, by cutting off supplies from abroad by sea, detaining in port the naval forces of the enemy, and by such actual warlike attacks, or demonstrations of attack, as shall require a diversion of a part of the enemy's force, or an abandonment of the place threatened, and sometimes a bombardment: [673] while, at the time, at some points always, and at others occasionally, the blockade will have mainly the features of a commercial blockade only. Will it be practicable to get formidable maritime nations to agree never to blockade, unless as part of an actual existing siege and investment of a port? Sebastopol, against which the energies of two great nations were directed almost solely for two years, was never in that condition. No attempt was made to invest it. Richmond was never in a condition of siege, in that sense. Indeed, with modern artillery, towns are to be defended and attacked at such distances that an investment or siege, in the old sense, is usually impossible, and, if possible, must be soon decisive. And, if the restriction is not to an actual investment or siege, is it probable that a test can be invented of such fairness and clearness of application that nations will agree to be bound by it, or will stay bound? Is it probable that nations with naval superiority will agree to leave war so much to land-forces as these propositions imply? As for the statement, that, in earlier times, purely commercial blockades are rarely found,—it is perhaps no more than saying that such blockades have grown with the growth and importance of commerce.

Those who have proposed the limitation have usually contended that blockades were originally confined, and ought again to be confined, to 'fortified places.' This distinction is assumed as a practicable one by Mr. Cass, and by Mr. Cobden in his speech of Oct. 24, 1862, at Manchester. But, in late times, there are no walled towns; and, with our present engines of war, the distinction between fortified and unfortified places is of little value. Cities are defended at strategic points of their distant neighborhoods, and by earthworks of rapid and rather easy construction; and any city may be said to be fortified, in time of war, which is in prospective peril and worth defending. So, as to naval arsenals and stations. In the United States generally, and sometimes in Europe, the largest commercial towns are naval stations: and, with the increase of the use of steam-machinery and iron, it is always open to a government to construct and arm many of its ships by contract, in commercial towns; and it is likely to be the practice, under pressure of war, and where a volunteer navy is employed.

When the parties to the Declaration of Paris proposed to abolish privateering, the United States contended that both equality and the interests of neutrals required the surrender of

blockade; 2dly, The knowledge of the party supposed to have offended; and, 3dly, Some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade.'^(a)⁽ⁱ⁾

Actual presence of the blockading force.

[673] § 512. 1. The definition of a lawful maritime blockade, requiring the actual presence of a maritime force, stationed at the entrance of the port, sufficiently near to prevent communication, as given by the text-writers, is confirmed [674] by the authority of numerous modern treaties, and especially by the convention of 1801, between Great Britain and Russia, intended as a final adjustment of the disputed points of maritime law, which had given rise to the armed neutrality of 1780 and of 1801.^(a)²³³

the right to capture enemy's property at sea; and the next step in the reasoning was, that such a surrender involved that of commercial blockades. Either from too large premises, or faulty deductions, the whole proposal seems to have fallen before its inherent difficulties and the tremendous necessities of war. As to the legality of commercial blockades, Napoleon assigned, as one of the defences of his Berlin decree, that England 'extended the right of blockade to unfortified cities and ports, to harbors and the mouths of rivers; while this right, according to reason and the usage of civilized nations, is only applicable to fortified places.' (Martens, tom. i. p. 439.) But, in this position, Napoleon is without support. Occasionally, in the American despatches, there have been intimations of that sort, *arguendo*, but no national act has been founded on that position; and the United States have recognized such blockades, and established the latest and largest. Among commentators, an Italian, Luchesi Palli,⁽¹¹⁾ sustains Napoleon's position (Principes du Droit Pub. Mar. p. 180); but it is discarded by Hautefeuille, Massé, Ortolan, Manning, Heffter, Kent, Wheaton, Phillimore, and Wildman. Mr. Westlake (Commercial Blockade, p. 6) finds [674] some diplomatic traces of the distinction, and approves the American suggestion; as does M. Casimir Périer, in the Revue des deux Mondes, 15th January, 1862, p. 434.

Mr. Cobden's speech, above referred to, shows in clear light the probable ineffectiveness of commercial blockades of the ports of a single country in Europe, while its communications by railroad with adjoining maritime friendly nations are unobstructed.]—D.

(a) The Betsey, Robinson's Adm. Rep. i. 92.

(a) The 3d art. sect. 4, of this convention, declares, 'That in order to determine what characterizes a blockaded port, that denomination is given only where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering.'

[²³³ *Effective Blockades*.—During the Crimean war, the English and French Declarations of 1854 assume an 'effective blockade, which may be established with an adequate force.' The Declaration of Paris, of 1856, requires that a blockade, to be binding on neutrals, shall be 'effective,—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.' This definition is unscientific, and, in its literal sense, requires an impossibility. Earl Russell, in a speech of 9th March, 1857, defines an effective blockade as 'such that no vessel could with safety attempt to pass through.' Earl Granville, in the debate of May 16, 1861, says, 'Such a force as, I do not say to make it impossible, but at any rate to make it very difficult, for vessels to obtain ingress or egress;' and Lord Brougham said, a blockade must be one which 'precluded a reasonable chance of entrance.' Earl Russell, in his instructions to Lord Lyons, of Feb. 15, 1862, respecting the American blockade, says, 'Assuming . . . that a number of ships is stationed, and remains at, the entrance of a port, sufficient really to prevent access to it, or to create an evident danger of entering or leaving it, and that these ships do not voluntarily permit ingress or egress, the fact that various ships have successfully escaped through it, will not of itself prevent the blockade being an effective one by international law.' See also Earl Russell to Mr. Mason, Feb. 17,⁽¹¹¹⁾ 1863, where his lordship explains the language of the Declaration of Paris as not intended to require that ingress and egress should be made

[¹ This is not an exact quotation from the decision.]—G.G.W.

[¹¹ For Luchesi Palli read Lucchesi-Palli.]—G.G.W.

[¹¹¹ For 17 read 10.]—G.G.W.

[675] § 513. The only exception to the general rule, which requires the actual presence of an adequate force to constitute a lawful Temporary interruption.

impossible, but as aimed at paper blockades, or nominal and practically insufficient blockades, and requiring only that the blockade be practically and reasonably effective. The Confederate authorities protested against this interpretation, but it was adhered to by the British Government. (Parliamentary Papers, 1863.)

M. Rouher, the French Minister of Commerce, communicated to the Chamber of Commerce in September, 1861, a note from the Department of Foreign Affairs, relating to the American blockade, in which the definition is stated, 'Forces sufficient to prevent the ports being approached without exposure to a certain danger.' (Moniteur Universel, September, 1861.)

Mr. Wheaton, in a note to Mr. Buchanan of July 1, 1846, during the Mexican war, uses the phrase, 'Forces stationed so near the ports as to render it dangerous to approach or enter them.'

During the civil war, the United States Government recognized fully the obligation to make its blockade actual and effective; and, in its diplomatic correspondence and judicial decisions, the definitions of an effective blockade 'were satisfactory to [675] neutrals, and substantially to the effect that the force must be sufficient to make ingress or egress by unarmed vessels sensibly dangerous; and the actual effectiveness of the blockade, wherever a case arose of a vessel captured or warned off, was never disputed by the neutral powers.' (Lord Lyons to Lord J. Russell, May 2, 1861. Same to same, May 4, 1861. Earl Russell's speech in the House of Lords, March 10, 1862. Sir R. Palmer's speech, March 7, 1862. Earl Russell to Lord Lyons, 15th February, 1862. Earl Russell to Mr. Mason, Feb. 10, 1863.)

NEUTRAL VESSELS OF WAR. Neutral vessels of war have no privilege against blockade; and the fact that they cannot be searched gives the blockading power the more right to require them to keep clear of the lines of blockade. (Mr. Wheaton to Mr. Buchanan, July 1, 1846. Ortolan, Dipl. de la Mer, tom. ii. p. 334. Hautefeuille, Droits des Nat. Neutr. tom. ii. p. 219.) During the Mexican blockade by France, special orders were given, prohibiting the entrance of neutral ships of war; but it was allowed by special orders in the civil war in the United States. (Lord Lyons to Admiral Milne, May 11, 1861.) And the United States permitted neutral vessels of war to carry through the blockades the official despatches not only of their own governments, but of other friendly governments. (Correspondence between Lord Lyons and Mr. Seward of Oct. 12 and 14, 1861: Dipl. Corr. 168, 173.)

With reference to occasional interruptions of a blockade by stress of weather, the French authors have a formal and fanciful theory, that blockade is an act of territorial jurisdiction by the belligerent, who obtains this jurisdiction by displacing the enemy's jurisdiction to the extent of the lines of blockade. (Hautefeuille, tom. iii, p. 120.⁽¹⁾ Ortolan, tom. ii. p. 311.) But it is not true that the blockade can be effectual only within the marine league or cannon-shot of the shore. Blockade is only a competition of diligence and force over waters either free to all, or within national jurisdiction, as it may be; and, if the blockade-runner gets in or escapes, he cannot be afterwards treated as having violated a jurisdictional right. Upon their theory, the French writers contend that an interruption ends a blockade, and requires a new acquisition of jurisdiction. But this is merely a change of words. The question is, as to each interruption, whether it was in fact such a break as to require new notice and new inception. The British and American writers and diplomatists take a practical view of the subject, and do not lay down an absolute rule that if, by stress of weather, there shall intervene an hour or day when the blockade was not effective, a new inception and notice is required. If the force and its disposition was adequate, and the interruption temporary by stress of weather, and with no change of intention, and restored in a reasonable time, the neutral has his chance of getting in or out; but a new inception, *ab origine*, is not required. Lord Russell, in his reply of Feb. 10, 1863, to Mr. Mason, the agent of the rebel States, says, 'There is no doubt that a blockade would be in legal existence, although a sudden storm or change of wind blew⁽¹¹⁾ off the squadron.⁽¹¹¹⁾ Such an accident does not suspend, much less break, a blockade; whereas, on the contrary, the driving off a blockading force by a superior force does break a blockade, which must be renewed *de novo*, in the usual form, to be binding upon neutrals.'

It has been held, in the British courts, that an effective blockade cannot be constituted

[¹ For tom. iii, p. 120 read tom. ii, p. 213.]—G.G.W.

[¹¹ For wind blew read wind occasionally blew.]—G.G.W.

[¹¹¹ After squadron a sentence is omitted.]—G.G.W.

blockade, arises out of the circumstance of the [676] occasional temporary absence of the blockading squadron, produced by accident, as in the case of a storm, which does not suspend the legal operation of the blockade. The law considers an attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade.^(a)²³⁴

Knowledge
of the party.

§ 514. 2. As a proclamation, or general public notification, is not of itself sufficient to constitute a legal blockade, so neither can a knowledge of the existence of such a blockade be imputed to the party, *merely* in consequence of such a proclamation or notification. Not only must an actual blockade exist, but a knowledge of it must be brought home to the party, in order to show that it has been violated.^(a) As, on the one hand, a declaration of blockade which is not supported by the fact cannot be deemed legally to exist, so, on the other hand, the fact, duly notified to the party on the spot, is of itself sufficient to affect him with a knowledge of it; for the public notifications between governments can be meant only for the information of individuals; but if the individual is personally informed, that purpose is still better obtained than by a public declaration.^(b) Where the vessel sails from a country lying sufficiently near to the blockaded port to have constant information of the state of the blockade, whether it is continued or is relaxed, no special notice is necessary; for the public declaration in this case implies notice to the party, after sufficient time has elapsed to receive the declaration at the port whence the vessel sails.^(c) But where [677] the country lies at such a distance that the inhabitants cannot have this constant information, they may lawfully send their vessels conjecturally, upon the expectation of finding the blockade broken up, after it has existed for a considerable time. In this case, the party has a right to make a fair inquiry whether the blockade be determined or not, and by drawing a line to prevent ships going to particular ports, if the line include other ports to which they have a right to go.

In the *Franciska* (Moore's Privy Council Cases, x. 37), it was held that it was not [676] competent for a belligerent to blockade a port as against neutrals, while he allowed his own or his enemy's merchant-vessels privileges of ingress and egress, for the purpose of trade, which were not allowed to the neutrals. The objections to such a course are not only that it is not equal, but that, if the courts should attempt to make it equal by extending the same privileges to neutrals in the same situation, there would arise a confusion and perplexity as to the nature of the blockade and the limits of the privileges, to which no neutrals ought to be subjected. The inclination of the Privy Council was to consider that no blockade was valid against neutrals, however its terms might be notified, unless it undertook to make a complete exclusion of trade and communication of all kinds, through the blockade, by ingress or egress; but it would not render a blockade invalid, to allow fixed periods of time, according to modern usage, for vessels in port, or destined to the port before the establishment of the blockade, to enter or come out, or to allow the passage of neutral vessels of war, or despatch-vessels, under neutral sovereign responsibility.]—D.

(a) *The Columbia*, Robinson's Adm. Rep. i. 154.

[²³⁴ See note 233, *ante*, on Effective Blockades.]—D.

(a) *The Betsey*, Robinson's Adm. Rep. i. 93.

(b) *The Mercurius*, Ibid. i. 83.

(c) *The Jonge Petronella*, Ibid. ii. 131. *The Calypso*, Ibid. 298.

consequently cannot be involved in the penalties affixed to a violation of it, unless, upon such inquiry, he receives notice of the existence of the blockade.^(d)

§ 515. 'There are,' says Sir W. Scott, 'two sorts of blockade: one by the *simple fact* only, the other by⁽ⁱ⁾ notification accompanied with the fact. In the former case, when the fact ceases otherwise than by accident, or the shifting of the wind, there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, I apprehend, *primâ facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty, undoubtedly, of a belligerent country, which has made the notification of blockade, to notify in the same way, and immediately, the discontinuance of it; to suffer the fact to cease, and to apply the notification again at a distant time, would be a fraud on neutral nations, and a conduct which we are not to suppose that any country would pursue. I do not say that a blockade of this sort may not, in any case,⁽ⁱⁱ⁾ expire *de facto*; but I say that⁽ⁱⁱⁱ⁾ such a conduct is not hastily to be presumed against any nation; and, therefore, till such a case is clearly made out, I shall hold that a blockade by notification is, *primâ facie*, to be presumed to continue till the notification is revoked.'^(a) And in another case, he says:—'The effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be nugatory,^(iv) if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be subject of representation to his own government, and may raise a claim of compensation from them, but it [678] can be no plea in the court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise; but this is a case of a blockade by notification. Another distinction between a notified blockade and a blockade existing *de facto* only, is, that in the former the act of sailing for^(v) a blockaded place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up; and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing

Constructive
or presumed
knowledge.

(d) The Betsey, Robinson's Adm. Rep. i. 332.

(a) The Neptunus, Ibid. i. 171.

[ⁱ For by *read* by a.]—G.G.W.

[ⁱⁱ For any case *read* any possible case.]—G.G.W.

[ⁱⁱⁱ *Omit* that.]—G.G.W.

[^{iv} For be nugatory *read* be the most nugatory thing in the world.]—G.G.W.

[^v For for *read* to.]—G.G.W.

de facto only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse for sailing on a doubtful and provisional destination.⁽ⁱ⁾(b)

Treaty
stipulations
as to notice.

§ 516. A more definite rule, as to the notification of an existing blockade, has been frequently provided by conventional stipulations between different maritime powers. Thus, by the 18th article of the treaty of 1794, between Great Britain and the United States, it was declared:—‘That⁽ⁱⁱⁱ⁾ whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper.’ This stipulation, which is equivalent to that contained in previous treaties between Great Britain and the Baltic powers, having been disregarded by the naval authorities and prize courts in the West Indies, the attention of the British government was called to the subject by an official communication from the American government. In consequence of this communication, instructions were sent out, in the year 1804, by the Board of Admiralty, to the naval commanders and judges of the Vice-Admiralty Courts, not to consider any blockade of the French West India Islands as existing, unless in respect to particular ports which were actually invested; and then not to capture vessels [679] bound to such ports, unless they should previously have been warned not to enter them. The stipulation in the treaty intended to be enforced by these instructions seems to be a correct exposition of the law of nations, and is admitted by the contracting parties to be a correct exposition of that law, or to constitute a rule between themselves in place of it. Neither the law of nations nor the treaty admits of the condemnation of a neutral vessel for the mere intention to enter a blockaded port, unconnected with any fact. In the above-cited cases, the fact of sailing was coupled with the intention, and the condemnation was thus founded upon a supposed actual breach of the blockade. Sailing for a blockaded port, knowing it to be blockaded, was there construed into an attempt to enter that port, and was, therefore, adjudged a breach of blockade from the departure of the vessel. But the fact of clearing out for a blockaded port is, in itself, innocent, unless it be accompanied with a knowledge of the blockade. The right to treat the vessel as an enemy is declared by Vattel, (liv. iii. sect. 177^(iv)), to be founded on the *attempt* to enter; and certainly this

(b) The *Neptunus*, Hempel, Robinson’s Adm. Rep. ii. 112.⁽¹¹⁾

[¹ Insert quotation mark after destination.]—G.G.W.

[ⁱⁱⁱ For That read And.]—G.G.W.

[¹¹ For 112 read 110.]—G.G.W.

[^{iv} For 177 read 117.]—G.G.W.

attempt must be made by a person knowing the fact. The import of the treaty, and of the instructions issued in pursuance of the treaty, is, that a vessel cannot be placed in the situation of one having a notice of the blockade, until she is warned off. They gave her a right to inquire of the blockading squadron, if she had not previously received this warning from one capable of giving it, and consequently dispensed with her making that inquiry elsewhere. A neutral vessel might thus lawfully sail for a blockaded port, knowing it to be blockaded; and being found sailing towards such a port would not constitute an attempt to break the blockade, unless she should be actually warned off.(a)

§ 517. Where an enemy's port was declared in a state of blockade by notification, and at the same time when the notification was issued news arrived that the blockading squadron had been driven off by a superior force of the enemy, the blockade was held by the Prize Court to be null and defective from the beginning, in the main circumstance that is essentially necessary to give it legal operation; and that it would be unjust to hold neutral vessels to the observance of a notification, accompanied by a circumstance that defeated its effect. This case was, therefore, considered as independent of the presumption arising from notification in other instances; the notification being defeated, it must have been shown that the actual blockade was again resumed, and the vessel would have been entitled to a warning, if any such blockade had existed when she arrived off the port. The mere act of sailing for the port, under the dubious state of the actual blockade at the time, was deemed insufficient to fix upon the vessel the penalty for breaking the blockade.(a)

Blockading
force driven
off by hostile
attack.

§ 518. In the above case, a question was raised whether the notification which had issued was not still operative; but the court was of opinion that it could not be so considered, and that a neutral power was not obliged, under such circumstances, to presume the continuance of a blockade, nor to act upon a supposition that the blockade would be resumed by any other competent force. But in a subsequent case, where it was suggested that the blockading squadron had actually returned to its former station off the port, in order to renew the blockade, a question arose whether there had been that notoriety of the fact, arising from the operation of time, or other circumstances, which must be taken to have brought the existence of the blockade to the knowledge of the parties. Among other modes of resolving this question, a prevailing consideration would have been the length of time, in proportion to the distance of the country from which the vessel sailed. But as nothing more came out in evidence than that the

New notice,
in such case.

(a) *Fitzsimmons v. The Newport Insurance Company*, Cranch's Rep. iv. 185. Mr. Merry's Letter to Mr. Secretary Madison, 12th April, 1804. Wheaton's Rep. iii. Appendix, 11.

(a) *The Triheten*, Robinson's Adm. Rep. vi. 65.

squadron came off the port on a certain day, it was held that this would not restore a blockade which had been thus effectually raised, but that it must be renewed again by notification, before foreign nations could be affected with an obligation to observe it. The squadron might return off the port with different intentions. It might arrive there as a fleet of observation merely, or for the purpose of only a qualified blockade. On the other hand, the commander might attempt to connect the two blockades together; but this is what could not be done; and, in order to revive the former blockade, the same form of communication must have been observed *de novo* that is necessary to establish an original blockade.^(a)²³⁵

(a) The *Hoffnung*, Rob. Adm. Rep. vi. 112.

^[235] *Notification of Blockade*.—The proclamation of the blockade in the American [681] civil war, by the President, April 19, 1861, had a clause that gave rise to doubt and difficulty. It says, 'I have deemed it advisable to set on foot a blockade of the ports within the States aforesaid, in pursuance of the laws of the United States and the laws of nations in such cases⁽¹⁾ provided. For this purpose, a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. If, therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave, any⁽¹¹⁾ of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will indorse on her register the fact and date of such warning; and, if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured,' &c. This last sentence is omitted in the proclamation of 27th April, extending the blockade to the ports of Virginia and North Carolina.

In answer to inquiries by Lord Lyons, Mr. Seward said that 'the proclamation is mere notice of an intention to carry it into effect, and the existence of the blockade will be made known in proper form by the blockading vessels.' (Lord Lyons to Lord Russell, May 4, 1861.) In answer to a further inquiry, whether it was the intention of the government to issue notice for each port as soon as the actual blockade of it should commence, Mr. Seward said, as reported by Lord Lyons to Earl Russell, 'that the practice of the United States was not to issue such notices, but to notify the blockade individually to each vessel approaching the blockaded ports,⁽¹¹¹⁾ and to inscribe a memorandum of the notice having been given, on the ship's papers. No vessel was liable to seizure which had not been individually warned.^(1v) The fact of there being blockading ships present to give the warning, was the best notice and best proof that the port was actually and effectually blockaded.' And, in Mr. Seward's letter to Mr. Adams of June 8, 1861, he says, 'The President's proclamation was a notice of the intention to blockade; and it was provided that ample warning should be given to vessels approaching and vessels seeking to leave the blockaded ports, before capture should be allowed. The blockade, from the time it takes effect, is everywhere rendered actual and effective.'

On the 30th April, Commodore Pendergrast, in command of the squadron of the coasts of Virginia and North Carolina, issued a proclamation announcing the actual commencement of the blockade, in which he limits the warning to vessels which should approach the line of blockade *in ignorance of its existence*. This construction of the proclamation was never disavowed by the government.

When the prize causes came up in the District Courts, it was contended for the claimants, that, under the proclamation, every vessel, whether in fact knowing of the blockade or not, was entitled to receive one notice and warning on the spot from the blockading vessels, and that none but second comers could be condemned. But the prize courts, without exception, denied this position. They held that, by the law of nations, if a vessel was captured off the blockaded port, with a destination into that port, and is shown, either by testimony or the force of settled presumptions, to have had knowledge that a blockade of that port had been instituted, she was subject to condemnation, and would not be permitted to show that her purpose was to satisfy herself on the spot that the blockade existed, or that it was effective.

^[1] For cases read case.]—G.G.W.

^[111] For ports read port.]—G.G.W.

^[11] For any read either.]—G.G.W.

^[1v] After warned a sentence is omitted.]—G.G.W.

[681] § 519. 3. Besides the knowledge of the party, some act of violation is essential to a breach of blockade; as either going in or Some act of violation necessary.

If the vessel honestly desires such information, she must get it elsewhere and otherwise. And they [682] held that the proclamation was not intended to waive the rights of belligerents in that particular. The proclamation, it is true, was only notice of an intent to blockade an entire coast; and a further knowledge of an actual blockade of the port or section in question must be brought home to the vessel captured. In the absence of special official proclamations as to each port, the knowledge could be brought home to the vessel either by proof of the previous warning named in the first proclamation, or by the direct proofs or presumptions allowed by the law of nations in such cases, as notoriety at the port of departure, and other modes, aided by the general knowledge of the intent as conveyed by the proclamation. (The *Revere*, Sprague's Decisions, ii.⁽¹⁾ and Law Reporter, xxiv. 276. Also, in the district of New York, before Judge Betts, the cases of *The Delta*, *Hiawatha*, *Crenshaw*, *Hallie Jackson*, *Edward Bernard*, *Louisa Agnes*, *Cheshire*, and *Empress*; and, in the Pennsylvania district, before Judge Grier, *The Admiral*. See Upton's Prize Law, 291-5.) This interpretation of the proclamation was sustained in the Supreme Court on appeal. (The Prize Causes,⁽¹¹⁾ Black. ii. 635.) Judge Grier, in delivering the opinion of the court, says, 'If the provision referred to in the proclamation of 19th April be applicable to the ports of Virginia, it must be considered in the light of surrounding circumstances.' Referring to the proclamation of Commodore Pendergrast, as not disavowed by the government, he adds that the warning provided 'was intended for the benefit of the innocent, not of the guilty. It would be absurd to warn parties who had full previous knowledge. According to the construction contended for, a vessel seeking to evade the blockade might approach and retreat any number of times; and, when caught, her captors could do nothing but warn her, and indorse the warning upon her register. The same process might be repeated at every port on the blockaded coast. Indeed, according to the literal terms of the proclamation, the Alabama might approach, and, if captured, insist upon the warning and indorsement on her registry, and then demand her discharge. A construction drawing after it consequences so absurd, is a *felo de se*.'

After these decisions, the practice became settled, and no complaint was made by neutral powers against this construction of the proclamation: and, under it, the law respecting notice of blockades was applied as heretofore in the English and American courts. (*Spes and Irene*, Rob. v. 77-81. *Betsey*, Ib. i. 334. *Arthur*, Edwards, 203. *Columbia*, Rob. i. 154-6. *Apollo*, Ib. v. 286-9. *Mercurius*, Ib. v.⁽¹¹¹⁾ 82. *Rolla*, Ib. vi. 364. *Franciska*, Moore's Privy Council Cases, x. 58. *Panaghia Rhomba*, Moore's Privy Council Cases, xii. 168.)

In the *Franciska* (Moore's Privy Council Cases, x. 59), the following points respecting notification of blockade were decided: Although the blockade be *de facto* only, the neutral cannot claim a right to a warning by the blockading vessels on the spot, but is affected by any kind or means of knowledge which may be proved against him, directly or by presumptions, as, for instance, the notoriety of the blockade at his last port of departure. If an official notification is relied upon, it must not be larger than the fact. A notice that several neighboring ports are under blockade, when, in fact, some of them were not, is an invalid notice. It does not give the neutral the choice of ports, which a notice according to the facts should have given him; and such notice is not good as to the ports actually blockaded, and will not affect the neutral with knowledge as to those ports. So, if a blockade *de facto* exists, but the government have allowed privileges, to their own or the enemy's merchant vessels, of ingress or egress, for the benefit of its own trade, then, even if such blockade be valid against [683] neutrals, or if they could be allowed the same privileges granted to the merchant-vessels of the belligerents, a notice of blockade would not be effectual, unless it explained clearly the privileges. And, in the case before the court, it was held that notoriety, at the vessel's port of departure, of a blockade subject to certain privileges of trade not specifically known, would not affect the neutral with knowledge.

It is a settled rule of law, that a vessel in a blockaded port has notice of a blockade as soon as it commences; and no evidence of her ignorance can be received. (Prize Causes,⁽¹¹⁾ Black. Rep. ii. 677.) At the beginning of the Crimean war, British Orders in Council of

[¹ For Decisions, ii read Decisions, ii. 107.]—G.G.W.

[¹¹ For Causes read Cases.]—G.G.W.

[¹¹¹ For v. read i.]—G.G.W.

coming out of the port with a cargo laden after the commencement of the blockade.^(a)

[682] Thus, by the edict of the States-General of Holland, of 1630, relative to the blockade of the ports of Flanders, it was ordered that the vessels and goods of neutrals which should be found going [683] in or coming out of the said ports, or so near thereto as to show beyond a doubt that they were endeavoring to run into them; or which, from the documents on board, should appear bound to the said ports, although they should be found at a distance from [684] them, should be confiscated, unless they should, voluntarily, before coming in sight of or being chased by the Dutch ships of war, change their intention, while the thing was yet undone, and alter their course. Bynkershoek, in commenting upon this part of the decree, defends the reasonableness of the provision which affects vessels *found so near to the blockaded*

March 29th, 1854, allowed Russian vessels in British ports six weeks from the date of the order, for loading and departing. This was extended, by an order of 15th April, so as to permit any Russian vessel that shall have sailed from a Russian port in the Baltic or White Seas before the 15th May, bound to any British port, to pursue her voyage, enter, discharge, and depart. This was held, in the *Franciska* (Moore's Privy Council Cases, x. 58⁽¹⁾), to include the right to depart from and return to ports under blockade, as well as open ports. The French Ordonnance 15th April, 1854, permitted Russian vessels bound to French ports to leave Russian ports in the Baltic or White Seas before 15th May, to pursue their voyage, and return to any port not blockaded.

The Russian ukase allowed English and French vessels in Russian ports in the Baltic six weeks, from 25th April, for loading and departing. The French Ordonnance of 26th April allowed to all Russian vessels, loaded in Russian ports on French account, free passage to French ports, and on English account to English ports, to 15th May. It was considered in the *Franciska* (*suprà*), that the allies must have intended to allow their own vessels as large a privilege in sailing from Russian ports as they allowed to enemies, and that the order of the 29th March must be considered as giving as large a right to enter blockaded ports as to depart from them. The allies afterwards allowed Russian vessels, in distant ports of the allies, six weeks after the promulgation of the order at such ports.

In 1854, April 13, Mr. Marcy, Secretary of State, writes to Mr. Buchanan, objecting to the rule that vessels found in a port, which they have entered for commercial purposes under the sanction of laws and treaties, should be prohibited completing the loading of their cargoes after knowledge of the blockade. M. Hautefeuille, however, assents to that prohibition as the law of nations, which, he thinks, only allows them to depart in ballast, or with such cargo as they have on board. (*Droits des Nat. Neutr.* tom. ii. p. 214.) The treaties of the United States with Chili in 1832, and Peru-Bolivia in 1836, prohibit the taking in cargo after the blockade begins (U. S. Laws, viii. 438, 491); while other treaties with South American States allow all vessels in port to depart, without reference to the time of taking in cargo. (*Ibid.* x. 862, 895.)

During the American civil war, in the case of the *Hiawatha*, lying at Richmond, Lord Lyons wrote to the Secretary of State; and the Secretary of the Navy replied, that 'fifteen days had been specified as the limit for neutrals to leave the ports, after actual blockade has commenced, with or without cargo.' (*The Prize Cases*, Black. Rep. ii. 676.) Judge Betts, of the United States Court for New York, having decided that a vessel leaving a blockaded port cannot take with her cargo shipped after the commencement of the blockade, Mr. Seward communicated that to Lord Lyons, as the rule to be followed. (Mr. Seward to Lord Lyons, 16th October, 1861: [684] *Dipl. Corr.* 1861, 173.) The result was, that a vessel had fifteen days as her limit for leaving port, and that she could not take in cargo after the blockade began. See also the *Tropic Wind*, decided by Judge Dunlop. Upton on Prize Law, 296.]—D.

(a) The *Betsey*, Robinson's Adm. Rep. i. 93.

[¹ For 58 read 37.]—G.G.W.

ports as to show beyond a doubt that they were endeavoring to run into them, upon the ground of legal presumption, with the exception of extreme and well-proved necessity only. Still more reasonable is the infliction of the penalty of confiscation, where the intention is expressly avowed by the papers found on board. The third article of the same edict also subjected to confiscation such vessels and their cargoes as should come out of the said ports, not having been forced into them by stress of weather, although they should be captured at a distance from them, unless they had, after leaving the enemy's port, performed their voyage to a port of their own country, or to some other neutral or free port, in which case they should be exempt from condemnation; but if, in coming out of the said ports of Flanders, they should be pursued by the Dutch ships of war, and chased into another port, such as their own, or that of their destination, and found on the high seas coming out of *such port*, in that case they might be captured and condemned. Bynkershoek considers this provision as distinguishing the case of a vessel having broken the blockade, and afterwards terminated her voyage by proceeding voluntarily to her destined port, and that of a vessel chased and compelled to take refuge; which latter might still be captured after leaving the port in which she had taken refuge. And in conformity with these principles is the more modern law and practice.^(b)

§ 520. With respect to violating a blockade by coming out with a cargo, the time of shipment is very material; for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose, in any way, to assist the exportation of the property of the enemy.^(a) A neutral ship departing can only take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade; if she afterwards take on board a cargo, it is a violation of the blockade. But where a ship was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade.^(b) So where goods were sent into the blockaded port before the commencement of the blockade, but re-shipped by order of the neutral proprietor, as found unsalable during the blockade, they were held entitled to restitution. For the same rule which permits neutrals to withdraw their vessels from a blockaded port extends also, with equal justice, to merchandise sent in before the blockade, and withdrawn *bonâ fide* by the neutral proprietor.^(c)

(b) Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 11. The Welvaart Van Pillaw, Robinson's Adm. Rep. i.⁽¹⁾ 128. The Juffrow Maria Schroeder, Ibid. iii. 147.

(a) The Betsey, Robinson's Adm. Rep. i. 93.

(b) The Vrow⁽¹⁾ Judith, Ib., 150.

(c) The Potsdam, Ib. iv. 89. Olivera v. Union Insurance Company, Wheaton's Rep. iii. 183.

[¹ For i. read ii.]—G.G.W.

[¹ For Vrow read Vrouw.]—G.G.W.

Purchase in
a blockaded
port.

§ 521. After the commencement of a blockade, a neutral is no longer at liberty to make any purchase in that port. Thus, where a ship which had been purchased by a neutral of the enemy in a blockaded port, and sailed on a voyage to the neutral country, had been driven by stress of weather into a belligerent port, where she was seized, she was held liable to condemnation under the general rule. That the vessel had been purchased out of the proceeds of the cargo of another vessel, was considered as an unavailing circumstance on a question of blockade. If the ship has been purchased in a blockaded port, *that* alone is the illegal act, and it is perfectly immaterial out of what funds the purchase was effected. Another distinction taken in argument was, that the vessel had terminated her voyage, and therefore that the penalty would no longer attach. But this was also overruled, because the port into which she had been driven was not represented as forming any part of her original destination. It was therefore impossible to consider this accident as any discontinuance of the voyage, or as a defeasance of the penalty which had been incurred.^(a)

Interior
canal navigation.

§ 522. A maritime blockade is not violated by sending goods to the blockaded port, or by bringing them from [686] the same, through the interior canal navigation or land carriage of the country. A blockade may be of different descriptions. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port. The legal blockade can extend no further than the actual blockade can be applied. If the place be not invested on the land side, its interior communications with other ports cannot be cut off. If the blockade be rendered imperfect by this rule of construction, it must be ascribed to its physical inadequacy, by which the extent of its legal pretensions is unavoidably limited.^(a) But goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, with the ship under charter-party proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation. This case is very different from the preceding, because there the communication had been by inland navigation, which was in no manner and in no part of it subject to the blockade.^(b)²³⁶

Duration of
the *delictum*.

§ 523. The offence incurred by a breach of blockade generally remains during the voyage; but the offence never travels on with the vessel further than to the end of the return voyage, although if she is taken in any part of that voyage, she is taken *in delicto*.²³⁷ This is deemed reasonable, because no other opportunity is afforded to the

(a) The *Juffrow Maria Schroeder*, Robinson's Adm. Rep. iv. note.⁽⁴⁾

(a) The *Comet*, Edwards's Adm. Rep. 32.

(b) The *Neutralitet*, Robinson's Adm. Rep. iii. 297. The *Stert*, Ib. iv. 65.

^[236] See note 231, *ante*, on Continuous Voyages.]—D.

^[237] *Hautefeuille*, on the theory of the local jurisdiction displaced and acquired by the

[¹ For iv. note read iv. 89. note.]—G.G.W.

belligerent cruisers to vindicate the violated law. But where the blockade has been raised between the time of sailing and the capture, the penalty does not attach; because the blockade being gone, the necessity of applying the penalty to prevent future transgression no longer exists.²³⁸ When the blockade is raised, a veil is thrown over every thing [687] that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is by subsequent events done away.(c)²³⁹

blockading force, would limit the right of capture to the region of sea and harbor actually held by that force (tom. ii. pp. 239, 244). But in this he is without support, either by judicial decisions, treaties, the opinions of commentators of received authority, or diplomatic positions taken by nations. (See *ante*, note 233, p. 675.) The right of capture on the return voyage was maintained by the United States Courts, in the civil war. The Mersey, Major Barbour, and J. H. Towne⁽¹⁾: Betts, J., in New York. See Upton on Prize Law, 290, 291.]—D.

[²³⁸ In the *Panaghia Rhomba*, Moore's Privy Council Rep. xii. 180, it was held to be 'an irresistible inference of law,' that the owners of a cargo are liable for the act of the master in attempting to run a blockade, if the cargo was shipped after they knew of the existence of the blockade, or might have known of it, and might by possibility [687] have been privy to the intent of the master. In such case, not only is no proof of their privity necessary, but they are not permitted to deny it.]—D.

(c) The *Welvaart Van Pillaw*, Robinson's Adm. Rep. ii. 128. The *Lisette*, Ib. vi. 387. As to how far the act of the master binds the ship-owner in cases of breach of blockade, see the cases collected in Wheaton's Reports, ii. Appendix, 36-40.

[²³⁹ *Municipal Surveillance*.—In time of civil war, where the insurgents have firm possession of a part of the country in which are ports open to foreign trade, by laws and treaties, and under the practice of friendly civilized nations, the question has arisen, whether the government can close those ports to all foreign trade, by a mere order or statute, without making an effective blockade under the law of nations. In the civil war in the United States, Congress passed an act authorizing the President to close any or all ports of entry in which the duties could not be collected effectually by the means provided by law. (U. S. Laws, xii. 256.) The act declared any vessel forfeit which should attempt to enter such port after it should be so closed. This was simply a municipal provision in an act for the collection of revenues, and looked to a civil forfeiture enforced by civil proceedings, and not to belligerent capture or prize proceedings. The right of a nation to close a port to foreign commerce for police reasons, or for any reasons within its discretion, in good faith, with no purpose hostile to treaty powers, and while it has jurisdiction over the port *de facto*, has always been conceded. In this category would come a suspension of a right to trade, while, by reason of mobs or mere insurrections, duties could not be collected, or the government could not guaranty the performance of its obligations to the foreign vessels. But the insurrection in the United States had risen to the dimensions of war, and the ports were in the possession of an organized body politic, assuming to be a sovereignty, and which foreign nations had recognized as a maritime belligerent. The United States Government did not undertake, under such circumstances, to put the statute into operation, but established a blockade 'in pursuance of the laws of nations;' and all the proceedings against vessels were in the prize courts, and under no other rules and principles than those which are enforced in international wars.

The British Government made known unequivocally that they would not recognize a right in the United States to close, by municipal rules, the ports in the possession of the insurgents, while they would admit the right to blockade them, as a belligerent act. Neither would they acquiesce in special prohibitions by municipal law, at the same time with a belligerent blockade. (Lord John Russell to Lord Lyons, July 19, 1861.)

The ports of the Argentine Republic were blockaded by England and France, and ports in Mexico by France in 1837-8, although a general state of war seems not to have been entirely recognized. During the wars of independence between the South American States and Spain, the Spanish Government seems to have attempted something like a combination of belligerent

[¹ For J. H. Towne read Joseph H. Toone.]—G.G.W.

Right of
visitation
and search.

[688] § 524. The right of visitation and search of neutral vessels at sea is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade.²⁴⁰ Even if the right [689] of capturing enemy's

blockade and municipal prohibition of trade. The United States insisted upon the right of neutrals to trade at the ports in the hands of the patriot governments, as against every thing but a blockade *jure gentium*:—those governments having firm possession of the ports, with civil institutions in actual operation, although their independence had not been recognized by the United States. (Mr. Monroe's correspondence of 20th and 25th March, 1816, with Señ. Onís; his instructions to Mr. Erving, Sept. 26, 1816. Mr. Adams's instructions to Mr. Nelson, 28th April, 1823: Cong. Doc. 1824.⁽¹⁾)

In 1836, Mexico attempted to close the ports of Texas by municipal decree, [688] unaccompanied by effective blockade. New Grenada, in 1861, announced the closing of certain of her ports, then in the possession of parties to a civil war. The British Government, admitting the right of New Grenada to close ports under her actual jurisdiction and control in time of peace, for reasons of State policy, instructed Admiral Milne to disregard the closing of those ports, unless on the principle of an effective blockade. During the Circassian insurrection, the Russian Government gave notice that certain ports in the hands of the insurgents were under naval surveillance, and that a naval force was stationed there to warn off trading-vessels and prevent all communication, but not making use of the word 'blockade.' The owner of a British vessel which had been so warned off, and lost her voyage thereby, applied to her government to obtain indemnification from Russia. The government did not, however, urge the claim to a decision; and the subject received no judicial or political determination. Russia seems not to have been willing to call it a blockade, and thus to open questions of belligerent rights with neutrals; yet she did not undertake a simple prohibition, but accompanied it with such force and notice as would have made it effectual as a blockade.]—D.

[²⁴⁰ *The Cagliari*.—In June, 1857, the *Cagliari*, a Sardinian merchant-steamer, sailed from Genoa bound to Tunis, when twenty-seven persons, who had embarked as passengers, but whose object was to promote an insurrection and civil war in the kingdom of Naples, rose and compelled the master to go to a small island where some Neapolitan political prisoners were confined. At this island the insurgents released these prisoners, and took them on board; and, sailing for the Neapolitan coast, the insurgents and the released prisoners left the vessel. The master stood out to sea, and was captured by a Neapolitan cruiser beyond the limits of Neapolitan waters. The case was submitted to the decision of a prize court of Naples, by which the vessel was condemned; and the government held her master and crew as prisoners of war at Salerno. Among the crew were two English engineers, Watt and Park. The Sardinian Government demanded the release of the vessel and crew, on the ground that the master acted under coercion, not suspecting the character of the passengers until they rose, and that at the time of capture he had resumed his lawful voyage. The Neapolitan Government refused the demand, and justified the condemnation on the ground that the vessel had been employed in acts of war against Naples, and denied the innocence of the master and crew. The Sardinian Government obtained opinions from Dr. Twiss and Dr. Phillimore, both of which eminent jurists took the ground that, as the vessel was under Sardinian flag and papers, and in the peace of nations, pursuing her lawful voyage on the high seas, at the time of the capture, it was illegal: she not being at the time under suspicion of a piratical condition, and the seizure not being belligerent, but by municipal law. They held that, for her prior acts, the Neapolitan Government could have recourse only to the government of Sardinia, as in any other case of an alleged wrong-doer who had escaped from its jurisdiction. M. de Cavour brought the matter to the attention of the governments of the principal powers of Europe, who proposed an arbitration under the provisions of the convention of Paris of 1856. The imprisonment of the English engineers, prolonged ten months, and attended with danger to their health, led the British Government to make a separate demand on the king of Naples for their release, by a special envoy, to which demand the king [689] acceded; not admitting any obligation to release

[¹ For Cong. Doc. 1824 read 18th Cong. 2d sess., Sen. Doc. No. 1, p. 269, 1824.]—G.G.W.

property be ever so strictly limited, and the rule of *free ships free goods* be adopted, the right of visitation and search is essential, in order to determine whether the ships them[690]selves are neutral, and documented as such, according to the law of nations and treaties; for, as Bynkershoek observes, 'It is lawful to detain a neutral vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral.' Indeed it seems that the practice of maritime captures

them, but putting it on the ground of humanity to the prisoners, and of favor to England, under the circumstances.

The crown lawyers of England had given an opinion that the original seizure was within the law of nations, but that the condemnation was unjustifiable. England further gave pressing advice to the court of Naples to release the vessel, on the ground that, whatever might be said of the seizure, the condemnation was unwarranted, but did not commit herself to an enforcement of the advice. (Speeches of Lord Derby and Lord Malmesbury, April, 1858.) The Neapolitan Government having refused restitution and delayed action on the demand for arbitration until eleven months had passed since the capture, Lord Malmesbury, by a despatch of 25th May, 1858, urged that government to agree at once to the arbitration of a third power, and declared that the delay to release the vessel or agree to arbitration for so long a time, was, in the opinion of the most eminent jurists, a violation of the law of nations, and suggested that the crew of the vessel should be released, under bail, during the arbitration. It was understood that Sardinia was about to make a like demand. The court of Naples placed itself in the attitude of yielding to superior force, and immediately delivered both the vessel and her crew into the hands of the English Consul, as an agent of the British Government, taking no notice of Sardinia; and by that consul they were taken to Genoa, and delivered to the custody of the authorities of Sardinia.

After this release, the Neapolitan prize tribunals of last resort proceeded to decide that the Cagliari was reasonably suspected of being engaged in acts which were mixed of war and piracy, and was therefore rightly seized, on the high seas, by a regular cruiser; and that she had been in fact so engaged, with the fault of her master and crew; and pronounced a decree condemning the owners of the Cagliari in costs.

If Naples was at war with the insurgents, and in the exercise of recognized maritime belligerent powers, the visit and search were lawful. If the persons lawfully in possession of the vessel had been using her in the service of the insurgents, she was rightfully condemned; and, as there was no pretence of a piratical state at the time when the vessel was searched, that was the only ground for condemnation. If the vessel had been temporarily used against the government, giving aid to its enemy, but had come back into the full possession of her neutral master, and was pursuing her peaceful voyage, there is no precedent justifying condemnation, and the case is novel; although, if taken in the act, or before being fully restored to peaceful custody, the rules of war would sustain a condemnation. (Carolina, Rob. iv. 256.) If Naples was not exercising war-powers against the insurgents, the visit and capture were unjustifiable, except on suspicion that the vessel was a pirate *jure gentium*; and there was certainly no proof to warrant condemnation on that ground. If she was not in the *status* of a pirate or outlaw at the time she was seized, as she certainly was not, she should have been restored with her crew, unless condemnable on strictly belligerent grounds. Belligerency between Naples and the insurgents had not been recognized by the other powers, and it does not seem to have been publicly asserted or claimed before by Naples; so that it is not easy to see how her prize tribunals had jurisdiction; and, if they had, the vessel could not have been condemned except upon the ground above stated, for which there is no precedent,—viz., that she had, at a previous period of the voyage, been in the enemy's service by force or fraud practised upon her, although she had regained her neutrality before capture. If Naples was in the exercise of war-powers, and so recognized by the nations concerned, and her prize court [690] believed the master to have been in complicity throughout, it would seem that, as the vessel was captured on the same voyage, though after return to neutral duty, a decree of condemnation might be sustained. Martens, Causes Célèbres, v. 600. See note 89, *ante*, Slave Trade—Visit and Search.]—D.

could not exist without it. Accordingly the text-writers generally concur in recognizing the existence of this right.^(a)²⁴¹

Right
of search,
now affected
by neutral
convoy.

§ 525. The international law on this subject is ably summed up by Sir W. Scott, in the case of *The Maria*, where the exercise of the right was attempted to be resisted by the interposition of a convoy of Swedish ships of war. In delivering the judgment of the High Court of Admiralty in that memorable case, this learned civilian lays down the three following principles of law:—

Sir W. Scott's
judgment in
the *Maria*.

§ 526. 1. That the right of visiting and searching merchant-ships on the high seas, whatever be the ships, the cargoes, the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. ⁽ⁱⁱⁱ⁾ 'I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships or the destination are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the right of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether [691] there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule that *free ships make free goods* must admit the exercise of this right, at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hübner himself, the great champion of neutral privileges.'

2. That the authority of the neutral sovereign being forcibly interposed cannot legally vary the rights of a lawfully commissioned belligerent cruiser. ⁽ⁱⁱⁱ⁾ 'Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their

(a) Bynkershoek, *Quæst. Jur. Pub. lib. i. cap. 14. Vattel, Droit des Gens, liv. iii. ch. 7, § 114. Martens, Précis, &c., liv. viii. ch. 7, §§ 317, 321. Galliani, dei Doveri de⁽¹⁾ Principi Neutrali, &c., p. 458. Lampredi, *Del Commercio de⁽¹¹⁾ Popoli Neutrali, &c., p. 185. Klüber, Droit des Gens Moderne de l'Europe, § 293.**

[²⁴¹ Hautefeuille, *Droits des Nat. Neutr. tit. 11, 12*, and in his pamphlet on the Trent, attempts a distinction between visit and search, and would confine the right of the belligerent to stopping the vessel, and inspecting the papers presented to him, and would make these papers conclusive on the question of nationality, ownership, contraband, and destination. But this is merely a suggestion of the learned commentator as to a possible policy, and has no support of authority either in the practice of nations, or the works of publicists. See notes, *ante*, 67, *Impressment of Seamen*; 89, *Slave Trade—Visit and Search*; 108, *Municipal Seizures beyond the Marine League*; and 223, *Free Ships, Free Goods.*]—D.

⁽¹⁾ For Galliani, dei Doveri de *read* Galiani, De^o Doveri de^o.]—G.G.W.

⁽¹¹⁾ For de *read* dei.]—G.G.W.

⁽¹¹¹⁾ This is not an exact quotation from the decision in *The Maria*.]—G.G.W.

merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independently of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it.¹

3. That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.⁽¹⁾ For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law. In book iii. c. 7, sect. 114, he expresses himself thus:—"On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents temps de se soumettre à cette visite. Aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise." Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting a fact—the fact that such is the existing practice of modern Europe. Conformably to this principle, we find in the celebrated French ordinance of 1681, now [692] in force, article 12, "That every vessel shall be good prize in case of resistance and combat;" and Valin, in his smaller Commentary, p. 81, says expressly, that, although the expression is in the conjunctive, yet that the *resistance alone is sufficient*. He refers to the Spanish ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, "in case of resistance *or* combat." And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time it occurs to my notice on the inquiries I have been able to make in the institutes of our own country respecting matters of this nature, except what occurs in the Black Book of the Admiralty, is in the order of council, 1664, art. 12, which directs, "That when any ship, met withal by the royal navy or other ship commissioned, shall fight or make resistance, the ship and goods shall be adjudged lawful prize." A similar article occurs in the proclamation of 1672. I am, therefore, warranted in saying, that it was the rule and the undisputed rule of the British admiralty. I will not say that the rule may not have been broken in upon, in some instances, by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for

[¹ This is not an exact quotation from the decision in *The Maria*.]—G.G.W.

no man can deny that a State may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having, in no case, any other right and title than what the State itself would possess under the same facts of capture. But I stand with confidence upon all principles of reason,—upon the distinct authority of Vattel,—upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down that, by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequence of confiscation.’^(a)²⁴²

(a) *The Maria*, Robinson’s *Adm. Rep.* i. 340.

[²⁴² *Convoy*.—The history of the subject of convoy may be stated thus:—Belligerents naturally tried to protect their own merchantmen, by sending them under the charge of their ships of war. The whole fleet being belligerents alike, and entitled alike to resist and deceive the common enemy, and alike subject to his right of capture, no objection could arise to their attempts to escape it by force or stratagem. When some of the continental nations were interested as neutrals in resisting altogether, or restricting to the utmost, the right of search, the device was adopted of throwing over [693] their merchant-vessels the protection of their own ships of war, in the nature and under the name of ‘convoy’. This was done for the purpose of protecting them by force against all exercise of belligerent search, and on the ground that neutrals had the right to resist it. The diplomatic and judicial history of the subject shows this to have been the principle and the purpose avowed. The question first presented was the right of the neutral sovereign to protect by force his merchant-vessels from all belligerent search. His right to protect them against it by force depended, of course, upon the question whether the belligerent had the right to search them if there was no convoy present. By the early treaties, several of the powers agreed to resist all attempts to interfere with a convoyed fleet, and to take the merchant-vessels of each other under convoy when both were neutrals; and this policy was carried out by orders to vessels acting as convoy. Great Britain denied this right of the neutral powers, and insisted on its right of belligerent search. The ground taken by Sir William Scott, in the *Maria* (Rob. i. 340), is that ‘the authority of the sovereign of the neutral country, being interposed in any manner of moral⁽¹⁾ force, cannot legally vary the rights of the⁽¹¹⁾ lawfully commissioned belligerent cruiser;’ and, in the *Elsebe*,⁽¹¹¹⁾ (Rob. iv. 408), ‘The^(1v) resistance being directed to be given by the sovereign of the neutral^(v) State affords no protection.’ But this attempt to exclude all search by national protection, was abandoned and renounced by the parties to the Armed Neutrality, after the battle of Copenhagen; and no question can now exist that it never did form a part of the law of nations, and it certainly does not now. All the English and American publicists, without exception, deny it. The author asserts a right of search against convoy in the text; and Kent says (i. 154), ‘Every belligerent power . . . has a right to insist on the only security known to the law of nations on this subject,—^(v1)the right of personal visitation and search, to be exercised by those who have an interest in making it. . . . A merchant-vessel has no right to say for itself, and an armed vessel has no right to say for it, that it will not submit to visitation and^(v11) search, or to be carried into a proximate court for judicial inquiry.’ Judge Story said, in the *Nereide* (Cranch, ix. 438), that the neutral, ‘in relation to his commerce, is bound to submit to the belligerent right of search, and cannot lawfully adopt any measures whose direct object is to withdraw that commerce from the most liberal and accurate search, without the application, on the part of the belligerent, of superior force.’ Dr. Woolsey, generally tender towards neutral rights, says, ‘On the ground of justice, this right [to protect from search by convoy] cannot be defended.’ (§ 192.) (See also Phillimore’s *Intern. Law*, iii. § 338. Manning’s *Intern. Law*, 360.

[¹ For moral read mere.]—G.G.W.

[¹¹¹ For *Elsebe* read *Elsabe*.]—G.G.W.

[^v Omit neutral.]—G.G.W.

[^{v11} For and read or.]—G.G.W.

[¹¹ For the read a.]—G.G.W.

[^{1v} For The read That.]—G.G.W.

[^{v1} For — insert . . .]—G.G.W.

[693] § 527. The judgment of condemnation pronounced in this case was followed by the treaty of armed neutrality, entered into by The armed
neutrality
of 1800.

Wildman's Intern. Law. ii. 124.) Although the treaty of the United States with Prussia in 1785, which soon expired by its terms (U. S. Laws, viii. 92), seems to look to an agreement to resist all search of convoyed vessels, no other treaty of the United States is of that character, and the government has never, by any national act, attempted to deny the right, as matter of international law.

Another ground taken by the same continental nations was, that, admitting the right of search, the belligerent, in exercising it, must take the word of the commander of the convoying vessel, as a substitute for actual search. This ground had also been taken before by some nations which had not gone the length of denying the right of search. The obligation of the cruiser to accept the word of the officer, in lieu of all search, was insisted on as a duty which, under the law of nations, the neutral could secure by force. Accordingly, if the belligerent insisted on more than [694] the word of the officer, the convoying vessels were directed to resist; and, of course, resistance being claimed as a right, the vessels convoyed could join in it. The bare statement of this claim shows that what shall be accepted in lieu of the exercise of an admitted right of search, must be matter of comity and arrangement, and that it cannot be of strict right that the word of the officer should be implicitly received. Still less could it be pretended that such was the law of nations, *i.e.*, the settled practice of nations. It was upon this claim that the second Armed Neutrality, that of 1800, placed itself. This claim fell with that Armed Neutrality, and was renounced in the treaty of June 17, 1801. It has been denied to be part of the law of nations by all the British and American publicists. (See Wheaton in the text. Kent's Comm. i. 154-7. Woolsey's Introd. § 192. Halleck's Intern. Law, 613-619. Phillimore, Intern. Law, iii. § 338. Manning's Intern. Law, 360. Wildman's Intern. Law, ii. 124. Judge Story in the Nereide, Cranch, ix. 438.) A little consideration will show how unsatisfactory the assurance of the convoying officer must be. The object of searching ostensible neutrals is to get evidence—(1) Whether they are *bonâ fide* neutrals, and their cargoes not enemy property, either actual or constructive; (2) Whether, if neutral, they are carrying contraband; (3) Whether they are in the service of the enemy, in the way of carrying military persons or despatches for the enemy; (4) Whether they are sailing in prosecution of an intent to break blockade. To satisfy these questions, it is allowable and sometimes necessary, not only to examine papers, but to inspect the vessels, the cargoes, and persons on board, so as to get light upon the actual destination of the vessel, beyond what is ostensible, upon the actual place of its departure, and the continuous or ultimate destination of cargo or persons on board, beyond even an actual proximate neutral destination; to probe hostile titles, interest, and liens, nationality of person, and personal knowledge of a blockade, &c. The question, therefore, as to each vessel, whether it is a proper subject of capture for any of these causes, is one mixed of law and fact. Of what value to the belligerent is the word of the officer in command of the convoy? What does or can he know of these facts, as to each vessel? What are his opinions of the law upon the facts which he does know? Is the belligerent to take his law as well as his facts? His word is not to facts, but, like the general verdict of the jury in criminal trials, is on the law and facts in a complex proposition. His word is simply that he knows of no enemy's interests in the vessels or cargoes, no contraband, no unlawful enterprise, no attempt to break blockade, &c.; or rather, in fact, it is this: "So far as I know the facts, and according to my understanding of the law, there are no such causes for capture." It may almost be presumed that he will not know the law adequately, and that he will be ignorant of many of the facts. He may have succeeded to the command, since the vessels joined the convoy. What examination has been made anywhere, on which his statement can be reasonably based? Nations may, as matter of comity or policy, agree revocably to take an officer's general word in lieu of search; but it is not an obligation of law to be supported by force.

It is true that certain continental writers have contended for this obligation of the belligerent, as being international law. But it may be said of most of these writers, as Mr. Halleck says of Hautefeuille in this connection: 'It must, however, be remembered, that he attempts to represent what *ought to be* the rule of international law, rather than what that law *really is* at the present time;' or, as might be added, 'what, *in the writer's opinion*, it ought to be.' According to some of the continental authors, this [695] word of the officer should be received as to the vessels of his own nation under his protection, as Martens, Rayneval, Klüber, Heffter,

the Baltic powers, in 1800, which league [694] was dissolved by the death of the Emperor Paul; and the points in controversy between those powers and Great Britain were finally adjusted by the convention of 5th June, 1801. By the 4th article [695] of this convention, the right of search as to merchant vessels sailing under neutral convoy was modified, by limiting it to public ships of war of the belligerent party, excluding private armed [696] vessels. Subject to this modification,

Massé, and Ortolan. Of these, Rayneval and Ortolan concede that, if the belligerent cruiser makes known to the convoying vessel that he has evidence against certain of his vessels, it is the duty of the convoying officer to make inquiries, in concert with the cruiser, as to the allegations. Hautefeuille, however, thinks that it is merely a moral obligation on the convoying officers to make sure of his own statements; and that he is entitled to do that alone, and in such way as he shall see fit. (Rayneval, *De la Liberté des Mers*, tom. i. ch. 18. Klüber, § 293. Massé, *Droit Comm.* liv. ii. ch. 3, § 9.¹ Ortolan, liv. iii. ch. 7. Heffter, § 170. Hautefeuille, *Des Nat. Neutr.* tit. ii. ch. 3.)

On the subject of convoy, the Declaration of Paris is silent; and so were the orders of the belligerent nations during the Crimean and Italian wars of 1852 and 1859, and the American civil war, except that a French order of 1854 required its officers to take the written declaration of the commander of the convoy, and, if that should not be satisfactory, to permit him to make his own visit and search. The United States, by many of its treaties, has agreed that the declaration of the commander of the convoy shall be sufficient. Such provisions are in the expired treaty with France of 1800, and in the treaties with the Netherlands in 1782, Prussia in 1799, and with Brazil, Mexico, Peru, Chili, Colombia, and Venezuela, between 1824 and 1852. (U. S. Laws, viii.) By the European treaty of 17th June, 1801, which followed the downfall of the second Armed Neutrality, special arrangements were provided as to the mode of search. The convoying vessel was to have the papers of all the vessels on board; and they were first to be examined there; if not satisfactory to the visiting vessel, the search of the vessels was to be made in the presence of an officer of the convoy; and, if that was still unsatisfactory, the suspected vessel might be taken to a proximate port of the belligerent for judicial inquiry.

This history of practices, conventions, and opinions is enough to show that international law does not prohibit search of convoyed vessels, nor substitute the word of the commander for actual search.

What are the consequences of sailing under neutral convoy? On that, there has been no direct judicial decision in the United States. The British decisions have been consistent with each other. Assuming the right to search vessels under neutral convoy as a right by international law, the law does not presume that the neutral sovereign intends to resist or impair a belligerent right; and the courts do not hold that the mere sailing under such convoy is evidence of an intent to resist or obstruct search. In the *Maria* (Rob. i. 340), the neutral convoy had instructions to resist search, and carried out the instructions, yielding only to superior force; and it was held as proved, that the merchant-vessels sailed under the convoy for the purpose of resisting search. Under these circumstances, the resistance by the convoy was held to involve the merchant-vessels, and to require their condemnation. In the *Elsebe*¹¹ (Rob. iv. 483¹¹¹), this rule was affirmed. Judge Story, in the *Nereide*, in the course of his reasoning, says, that, if a neutral 'resists the exercise of a lawful right, or if, *with a view to it*, he takes the protection of an armed neutral convoy, he is treated as an enemy'; and Kent says, 'The very act of sailing under the protection of a belligerent or neutral convoy, for the purpose of resisting search, is a violation of neutrality.' These citations, taken strictly, may go somewhat farther than the decisions; for Sir William Scott, in the *Maria*, examined into the question whether there had been a [696] *bonâ fide* abandonment of the original intention with which the vessel took convoy, and being satisfied that there was only a yielding to a present superior force, he decided that there was not such an abandonment, without deciding whether, if there had been an abandonment, the fact of having sailed with such an intent, under convoy so instructed, would still have been conclusive against the vessel.]—D.

¹ For liv. ii. ch. 3, § 9 read liv. ii. tit. i. ch. 2, § 9, ed. 1861.]—G.G.W.

¹¹ For *Elsebe* read *Elsabe*.]—G.G.W.

¹¹¹ For 483 read 408.]—G.G.W.

the pretension of resisting by means of convoy the exercise of the belligerent right of search was surrendered by Russia and the other northern powers, and various regulations were provided to prevent the abuse of that right to the injury of neutral commerce. As has already been observed, the object of this treaty is expressly declared by the contracting parties, in its preamble, to be the settlement of the differences which had grown out of the armed neutrality by 'an invariable determination of their principles upon the rights of neutrality in their application to their respective monarchies. The 8th article also provides that 'the principles and measures adopted by the present act shall be alike applicable to all the maritime wars in which one of the two powers may be engaged, whilst the other remains neutral. These stipulations shall consequently be regarded as permanent, and shall serve as a constant rule for the contracting parties in matters of commerce and navigation.'^(a)

§ 528. In the case of *The Maria*, the resistance of the conveying ship was held to be a resistance of the whole fleet of merchant vessels under convoy, and subjected the whole to confiscation. This was a case of neutral property condemned for an attempted resistance by a neutral armed vessel to the exercise of the right of visitation and search, by a lawfully commissioned belligerent cruiser. But the forcible resistance by an enemy master will not, in general, affect neutral property laden on board an enemy's merchant vessel; for an attempt on his part to rescue his vessel from the possession of the captor, is nothing more than the hostile act of a hostile person, who has a perfect right to make such an attempt. 'If a *neutral* master,' says Sir W. Scott, 'attempts a rescue, or to withdraw himself from search, [697] he violates a duty which is imposed upon him by the law of nations, to submit to search, and to come in for inquiry as to the property of the ship or cargo; and if he violates this obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the whole property intrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the rights of war. With an *enemy* master, the case is very different; no duty is violated by such an act on his part—*lupum auribus teneo*, and if he can withdraw himself he has a right so to do.'^(a)⁽¹⁾

Forcible
resistance
by an enemy
master.

(a) The question arising out of the case of the Swedish convoy gave rise to several instructive polemic essays. The judgment of Sir W. Scott was attacked by Professor J. F. W. Schlegel, of Copenhagen, in a treatise on the visitation of neutral ships under convoy, transl. London, 1801; and vindicated by Dr. Croke in 'Remarks on M. Schlegel's Work,' 1801. See also 'Letters of Sulpicius on the Northern Confederacy,' London, 1801. 'Substance of the Speech of Lord Grenville in the House of Lords, Nov. 13, 1801,' London, 1802. Wheaton's Hist. Law of Nations, 390-420.

(a) *The Catherina*⁽¹¹⁾ *Elizabeth*, Robinson's Adm. Rep. v. 232.

[¹ This is not an exact quotation from the decision.]—G.G.W.

[¹¹ For *Catherina* read *Catharina*.]—G.G.W.

Right of
a neutral to
carry his
goods in an
armed enemy
vessel.

§ 529. The question how far a neutral merchant has a right to lade his goods on board an armed enemy vessel, and how far his property is involved in the consequences of resistance by the enemy master, was agitated both in the British and American prize courts, during the last war between Great Britain and the United States. In a case adjudged by the Supreme Court of the United States, in 1815, it was determined, that a neutral had a right to charter and lade his goods on board a belligerent armed merchant ship, without forfeiting his neutral character, unless he actually concurred and participated in the enemy master's resistance to capture. (a) Contemporaneously with this decision of the American court, Sir W. Scott held directly the contrary doctrine, and decreed salvage for the recapture of neutral Portuguese property, previously taken by an American cruiser from on board an armed British vessel, upon the ground that the American prize courts might justly have condemned the property. (b) In reviewing its former decision, in a subsequent case adjudged in 1818, the American court confirmed it; and, alluding to the decisions in the English High Court of Admiralty, stated, that if a similar case should again occur in that court, and the decisions of the American court should in the mean time have reached the learned judge, he would be called upon to acknowledge that the danger of condemnation in the United States courts was not as great as he had imagined. In determining the last-mentioned case, the American court distinguished it both from those where neutral vessels were condemned for the unneutral act of the convoying vessel, and those where neutral vessels had been [698] condemned for placing themselves under enemy's convoy. With regard to the first class of cases, it was well known that they originated in the capture of the Swedish convoy, at the time when Great Britain had resolved to throw down the glove to all the world, on the contested principles of the northern maritime confederacy. But, independently of this, there were several considerations which presented an obvious distinction between both classes of cases and that under consideration. A convoy was an association for a hostile object. In undertaking it, a State spreads over the merchant vessels an immunity from search which belongs only to a national ship; and by joining a convoy, every individual vessel puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine. If, then, the association be voluntary, the neutral, in suffering the fate of the entire convoy, has only to regret his own folly in wedding his fortune to theirs; or if involved in the resistance of the convoying ship, he shares the fate to which the leader of his own choice is liable in case of capture. (c)²⁴³

(a) *The Nereide*, Cranch's Rep. ix. 388.

(b) *The Fanny*, Dodson's Adm. Rep. i. 443.

(c) *The Atalanta*, Wheaton's Rep. iii. 409.

[²⁴³ *Neutral Goods in Armed Enemy Merchantmen*.—The author has failed to notice the

[699] § 530. The Danish government issued, in 1810, an ordinance relating to captures, which declared to be good and lawful prize

Neutral vessels under enemy's convoy, liable to capture.

fact that, in the *Nereide*, the court was divided,—three judges against two, and that Judge Story gave an elaborate dissenting opinion. On the other hand, this opinion is cited by Wildman as if it were the decision of the court. It is further to be observed, that the court consisted of seven judges; of whom, two did not sit in the case; two sustained the general principle in favor of the neutral shipper; two sustained the general principle against him; and the majority for restitution was obtained by the course of Judge Johnson, who went a good deal upon peculiar grounds and on the special circumstances, as he more fully explained afterwards in his opinion in the case of the *Atalanta* (Wheaton, iii. 417). The opinions in the *Nereide* of those two masters of international law, Marshall and Story, carefully written out by themselves, after arguments by the most eminent counsel, Pinkney and Emmett,—which professional traditions place among the foremost of forensic successes,—are remarkable instances of the application of original power to the examination of general principles of law and the natural presumptions from facts. In Judge Story's *Life*, vol. i. p. 256, is a letter, in which he says: 'I have been lately⁽¹⁾ engaged in drawing up my dissenting opinion in the case of the *Nereide*. I have now completed it; and never, in my whole life, was I more entirely satisfied that the court were wrong in their judgment.' The opinion of jurists has been about as much divided as that of the court. It should be said, however, that, in the case of the *Atalanta*, where the decision of the *Nereide* was re-affirmed, Judge Johnson gave his adherence to the general principle on which the opinion of the Chief Justice, in the *Nereide*, had been based. It is singular that the Chief Justice, in the *Nereide*, takes no notice of the fact that she was under enemy convoy, upon which the minority laid a good deal of stress. The decision stands upon this principle; viz., that, when belligerents accorded to neutrals the right to transport their goods in belligerent vessels, they waived whatever of advantage [699] for capture or search they would have possessed over the same goods in neutral vessels; and incurred the disadvantage, whatever it may be, arising from the fact that the belligerent vessel has the right, and must be expected to, avoid and resist capture and search alike, by all means of force or stratagem in its power; and that it is in vain to say now that the neutral is in fault and liable to condemnation, because the carrier of his goods, being armed, is the better able to effectuate his right to defeat search or capture. As the belligerent carrier is the subject of capture, from the fact that he is an enemy, without any other proof being necessary, and a yielding by him to visit and search of his cargo would be in fact a surrender of his vessel to capture, the according to the neutral of a right to send his cargo in a vessel in that predicament must be held to be a waiver by the belligerent of his right to an unresisted and uneluded search. It is, in truth, with the belligerent, a capture of the vessel by force of war, or it is nothing; and, in case of such capture, the neutral goods are restored, if the shipper has done no more than the act of sending them in such vessel. If he has taken active part in aiding in the resistance, his case may stand in a different position.

Judge Story, on the other hand, contended for the condemnation on two grounds,—*first*, that the shipper had stipulated for enemy convoy, was actually sailing under it until just before, and was seeking to regain it at the time of, capture. The sailing by a neutral under enemy convoy, he regards as a joint enterprise for the benefit of both, in which each assists the other against the opposite belligerent, by signals, stratagem, and force, to the injury of that belligerent's right of search and capture alike, and will justify the condemnation of the neutral for an unneutral act; *second*, he defines the right of the neutral to send goods in enemy ships to be simply no more than this,—that the fact of his goods being found in such a ship does not taint them with hostility. The goods stand or fall upon their own character. If they are *bonâ fide* neutral, and are involved in no illegal act, they are restored; but, though neutral, they will be condemned if so involved. And he contends that, if the neutral voluntarily and knowingly places them in the custody of an enemy who is armed for the purpose of resisting or capturing the visiting belligerent, as the fortune of war may turn, and contributes, by freight if not otherwise, to the ability of the enemy, he cannot, if resistance is actually made and fails, claim the protection of his bare neutral nationality against the captors. But, in the case before him, he added the facts which he considered proved by the evidence, as still further

[¹ For lately read latterly.]—G.G.W.

'such vessels as, notwithstanding their flag is considered neutral, as well with regard [700] to Great Britain as the powers at war with the same nation, still, either in the Atlantic or Baltic, have made use of English convoy.' Under this ordinance, many American neutral vessels were captured, and, with their cargoes, condemned in the Danish prize courts for offending against its provisions. In the course of the discussions which subsequently took place between the American and Danish governments respecting the legality of these condemnations, the principles upon which the ordinance was grounded were questioned by the United States government, as inconsistent with the established rules of international law. It was insisted that the prize ordinances of Denmark, or of any other particular State, could not make or alter the general law of nations, nor introduce a new rule binding on neutral powers. The right of the Danish monarch to legislate for his own subjects and his own tribunals was incontestable; but before his edicts could operate upon foreigners carrying on their commerce upon the seas, which are the common property of all nations, it must be shown that they were conformable to the law by which all are bound. It was, however, unnecessary to suppose that, in issuing these instructions to its cruisers, the Danish government intended to do any thing more than merely to lay down rules of decision for its own tribunals, conformable to what that government understood to be just principles of public law. But the observation became important when it was considered, that the law of nations nowhere existed in the written code accessible to all, and to whose authority all deferred; and that the present question regarded the application of a principle (to say the least) of doubtful authority, to the confiscation of neutral property for a supposed offence committed, not by the owner, but by his agent the master, without the knowledge or orders of the owner, under a bel-
coloring the unneutral conduct, and making it a different case from that of a casual shipper in general ship. He says, 'I cannot bring my mind to believe that a neutral can charter an armed enemy ship, and victual and man her with an enemy crew (for, though furnished directly by the owner, they are, in effect, paid and supported by the charterer), with the avowed knowledge and necessary intent that she should resist every enemy; that he can take on board hostile shipments on freights,^[1] commissions, and profits; that he can stipulate expressly for the benefit and use of enemy convoy, and navigate, during the voyage, under its guns and protection; that he can be the entire projector and conductor of the voyage, and co-operate in all the plans of the general owner of the vessel^[11] to render resistance to search secure and effectual; and yet,^[111] notwithstanding all this conduct, by the law of nations may^[1v] shelter his property from confiscation, and claim the privileges of an inoffensive neutral. On the contrary, it seems to me that such conduct is utterly irreconcilable with the good [700] faith of a friend, and unites all the qualities of the most odious hostility. It wears the habiliments of neutrality only when the sword and the armor of an enemy become useless for defence.' To the argument from the fact that the armed enemy vessel had no commission or letter of marque, the learned judge answered that those were matters entirely between that vessel and her own government.]—D.

[¹ For freights read freight.]—G.G.W.

[¹¹ For the general owner of the vessel read the owner.]—G.G.W.

[¹¹¹ For and yet read and that yet.]—G.G.W.

[^{1v} For nations may read nations, he may.]—G.G.W.

ligerent edict, retrospective in its operation, because unknown to those whom it was to affect.

§ 531. The principle laid down in the ordinance, as interpreted by the Danish tribunals, was, that the fact of having navigated under enemy's convoy is, *per se*, a justifiable cause, not of capture merely, but of condemnation in the courts of the other belligerent; and *that*, without [701] inquiring into the proofs of proprietary interest, or the circumstances and motives under which the captured vessel had joined the convoy, or into the legality of the voyage, or the innocence of her conduct in other respects. A belligerent pretension so harsh, apparently so new, and so important in its consequences, before it could be assented to by the neutral States, must be rigorously demonstrated by the authority of the writers on public law, or shown to be countenanced by the usage of nations. Not one of the numerous expounders of that law even mentioned it; no belligerent nation had ever before acted upon it; and still less could it be asserted that any neutral nation had ever acquiesced in it. Great Britain, indeed, had contended that a neutral State had no right to resist the exercise of the belligerent claim of visitation and search by means of convoys *consisting of its own ships of war*. But the records even of the *British* courts of admiralty might be searched in vain for a precedent to support the principle maintained by Denmark, that the mere fact of having sailed under a belligerent convoy is, in all cases and under all circumstances, conclusive cause of condemnation.

Captures under the Danish ordinance of 1810. Claims of the United States.

§ 532. The American vessels in question were engaged in their accustomed lawful trade, between Russia and the United States; they were unarmed, and made no resistance to the Danish cruisers; they were captured on the return voyage, after having passed up the Baltic and been subjected to examination by the Danish cruisers and authorities; and were condemned under an edict which was unknown, and consequently, as to them, did not exist when they sailed from Cronstadt, and which, unless it could be strictly shown to be consistent with the pre-existing law of nations, must be considered as an unauthorized measure of retrospective legislation. To visit upon neutral merchants and mariners extremely penal consequences from an act, which they had reason to believe to be innocent at the time, and which is not pretended to be forbidden by a single treaty or writer upon public law, by the general usage of nations, or even by the practice of any one belligerent, or the acquiescence of any one neutral State, must require something more than a mere resort to the supposed analogy of other acknowledged principles of international law, but from which it would be vain to attempt to deduce that now in question as a corollary.

The argument of the American commissioner.

Being found in company with an enemy's convoy might, indeed, [702] furnish a *presumption* that the captured vessel and cargo belonged

to the enemy, in the same manner as goods taken in an enemy's vessel are presumed to be enemy's property until the contrary is proved; but this presumption is not of that class of presumptions called *presumptiones juris et de jure*, which are held to be conclusive upon the party, and which he is not at liberty to controvert. It is a slight presumption only, which will readily yield to countervailing proof. One of the proofs which, in the opinion of the American negotiator, ought to have been admitted by the prize tribunal to countervail this presumption, would have been evidence that the vessel had been compelled to join the convoy; or that she had joined it, not to protect herself from examination by Danish cruisers, but against others, whose notorious conduct and avowed principles render it certain, that captures by them would inevitably be followed by condemnation. It followed, then, that the simple fact of having navigated under British convoy could be considered as a ground of suspicion only, warranting the captors in sending in the captured vessel for further examination, but not constituting in itself a conclusive ground of confiscation.

Indeed it was not perceived how it could be so considered, upon the mere ground of its interfering with the exercise of the belligerent pretension of visitation and search, by a State, which, when neutral, had asserted the right of protecting its private commerce against belligerent visitation and search by armed convoys of its own public ships.

The argument of the American commissioner, continued.

§ 533. Nor could the consistency of the Danish government, in this respect, be vindicated, by assuming a distinction between the doctrine maintained by Denmark, when neutral, against Great Britain, from that which she sought, as a belligerent, to enforce against America. Why was it that navigating under the convoy of a *neutral* ship of war was deemed a conclusive cause of condemnation? It was because it tended to impede and defeat the belligerent right of search—to render every attempt to exercise this lawful right a contest of violence—to disturb the peace of the world, and to withdraw from the proper forum the determination of such controversies by forcibly preventing the exercise of its jurisdiction.

The mere circumstance of sailing in company with a *belligerent* convoy had no such effect; being an *enemy*, the belligerent had [703] *a right to resist*. The masters of the vessels under his convoy could not be involved in the consequences of that resistance, because they were neutral, and had not actually participated in the resistance. They could no more be involved in the consequences of a resistance by the belligerent, which is his own lawful act, than is the neutral shipper of goods on board a belligerent vessel for the resistance of the master of that vessel, or the owner of neutral goods found in a belligerent fortress for the consequences of its resistance.

The right of capture in war extends only to things actually belong-

ing to the enemy, or such as are considered as constructively belonging to him, because taken in a trade prohibited by the laws of war, such as contraband property taken in breach of blockade,²⁴⁴ and other analogous cases; but the property now in question was neither constructively nor actually the property of the enemy of Denmark. It was not pretended that it was actually his property, and it could not be shown to have been constructively his. If, indeed, these American vessels had been armed; if they had thus contributed to augment the force of the belligerent convoy; or if they had actually participated in battle with the Danish cruisers,—they would justly have fallen by the fate of war, and the voice of the American government would never have been raised in their favor. But they were, in fact, unarmed merchantmen; and far from increasing the force of the British convoying squadron, their junction tended to weaken it by expanding the sphere of its protecting duty; and instead of participating in the enemy's resistance, in fact there was no battle and no resistance, and the merchant vessels fell a defenceless prey to the assailants.

§ 534. The illegality of the act on the part of the neutral masters, for which the property of their owners had been confiscated, must then be sought for in a higher source, and must be referred back to the circumstance of *their joining the convoy*. But why should this circumstance be considered illegal, any more than the fact of a neutral taking shelter in a belligerent port, or under the guns of a belligerent fortress which is subsequently invested and taken? The neutral cannot, indeed, seek to escape from visitation and search by *unlawful* means, [704] either of force or fraud; but if, by the use of any lawful and innocent means, he may escape, what is to hinder his resorting to such means, for the purpose of avoiding a proceeding so vexatious? The belligerent cruisers and prize courts had not always been so moderate and just as to render it desirable for the neutral voluntarily to seek for an opportunity of being examined and judged by them. Upon the supposition, indeed, that justice was administered promptly, impartially, and purely in the prize tribunals of Denmark, the American shipmasters could have had no motive to avoid an examination by Danish cruisers, since their proofs of property were clear, their voyages lawful, and they were not conscious of being exposed to the slightest hazard of condemnation in these tribunals. Indeed, some of these vessels had been examined on their voyage up the Baltic, and acquitted by the Danish courts of admiralty. Why, then, should a guilty motive be imputed to them, when their conduct could be more naturally explained by an innocent

The argument
of the
American
commissioner,
continued.

[²⁴⁴ This should doubtless read, 'contraband property, or property taken in breach of blockade.']—D.⁽¹⁾

[¹ There is a comma between the word 'contraband' and the word 'property' in the first and early editions, though Lawrence does not insert the comma.]—G.G.W.

one? Surely, in the multiplied ravages to which neutral commerce was then exposed on every sea, from the sweeping decrees of confiscation fulminated by the great belligerent powers, the conduct of these parties might be sufficiently accounted for, without resorting to the supposition that they meant to resist or even to evade the exercise of the belligerent rights of Denmark.

Even admitting, then, that the neutral American had no right to put himself under convoy in order to avoid the exercise of the right of visitation and search by a *friend*, as Denmark professed to be, he had still a perfect right to defend himself against his *enemy*, as France had shown herself to be, by her conduct, and the avowed principles upon which she had declared open war against all neutral trade. Denmark had a right to capture the commerce of her enemy, and for that purpose to search and examine vessels under the neutral flag, whilst America had an equal right to protect her commerce against French capture by all the means allowed by the ordinary laws of war between enemies. The exercise of this perfect right could not legally be affected by the circumstance of the war existing between Denmark and England, or by the alliance between Denmark and France. America and England were at peace. The alliance between Denmark and France was against England, not against America; and the Danish government, which had refused to adopt the decrees of Berlin and [705] Milan as the rule of its conduct towards neutrals, could not surely consider it culpable on the part of the American shipmasters to have defended themselves against the operation of these decrees by every means in their power. If the use of any of these means conflicted in any degree with the belligerent rights of Denmark, that was an incidental consequence, which could not be avoided by the parties without sacrificing their incontestable right of self-defence.

The argument
of the
American
commissioner,
continued.

§ 535. But it might perhaps be said, that as resistance to the right of search is, by the law and usage of nations, a substantive ground of condemnation *in the case of the master of a single ship*, still more must it be so, where *many vessels are associated* for the purpose of defeating the exercise of the same right.

In order to render the two cases stated perfectly analogous, there must have been an actual resistance on the part of the vessels in question, or, at least, on the part of the enemy's fleet, having them at the time under its protection, so as to connect them inseparably with the acts of the enemy. Here was no *actual* resistance on the part of either, but only a *constructive* resistance on the part of the neutral vessels, implied from the fact of their having joined the enemy's convoy. This, however, was, at most, a *mere intention to resist*, never carried into effect, which had never been considered in the case of a single ship, as involving the penalty of confiscation. But the resistance of the master

of a single ship, which is supposed to be analogous to the case of convoy, must refer to a *neutral* master, whose resistance would, by the established law of nations, involve both ship and cargo in the penalty of confiscation. The same principle would not, however, apply to the case of an *enemy*-master, who has an incontestable right to resist his enemy, and whose resistance could not affect the *neutral owner of the cargo*, unless he was on board, and actually participated in the resistance. Such was, in a similar case, the judgment of Sir W. Scott. So also the right of a neutral to transport his goods on board even of an *armed* belligerent vessel, was solemnly affirmed by the decision of the highest judicial tribunal in the United States, during the late war with Great Britain, after a most elaborate discussion, in which all the principles and analogies of public law bearing upon the question were thoroughly examined and considered.

[706] The American negotiator then confidently relied upon the position assumed by him—that the entire silence of all the authoritative writers on public law, as to any such exception to the general freedom of neutral navigation, laid down by them in such broad and comprehensive terms, and of every treaty made for the special purpose of defining and regulating the rights of neutral commerce and navigation, constituted of itself a strong negative authority to show, that no such exception exists, especially as that freedom is expressly extended to every case which has the slightest resemblance to that in question. It could not be denied that the goods of a friend, found in an enemy's fortress, are exempt from confiscation as prize of war; that a neutral may lawfully carry his goods in an armed belligerent ship; that the neutral shipper of goods on board an enemy's vessel, (armed or unarmed,) is not responsible for the consequences of resistance by the enemy-master. How then could the neutral owner, both of ship and cargo, be responsible for the acts of the belligerent convoy, under the protection of which his property had been placed, not by his own immediate act, but by that of the master, proceeding without the knowledge or instructions of the owner?

Such would certainly be the view of the question, even applying to it the largest measure of belligerent rights ever assumed by any maritime State. But when examined by the milder interpretations of public law, which the Danish government, in common with the other northern powers of Europe, had hitherto patronized, it would be found still more clear of doubt. If, as Denmark had always insisted, a neutral might lawfully arm himself against all the belligerents; if he might place himself under the convoying force of his own country, so as to defy the exercise of belligerent force to compel him to submit to visitation and search on the high seas; the conduct of the neutral Americans who were driven to take shelter under the floating fortresses

of the enemy of Denmark, not for the purpose of resisting the exercise of her belligerent rights, but to protect themselves against the lawless violence of those whose avowed purpose rendered it certain, that, notwithstanding this neutrality, capture would inevitably be followed by condemnation, would find its complete vindication in the principles which the public jurists and statesmen of that country had maintained in the face of the world. Had the American commerce in the Baltic been placed under the protection of the public ships [707] of war of the United States, as it was admitted it might have been, the belligerent rights of Denmark would have been just as much infringed as they were by what actually happened. In that case, the Danish cruisers must, upon Danish principles, have been satisfied with the assurance of the commander of the American convoying squadron, as to the neutrality of the ships and cargoes sailing under his protection. But that assurance could only have been founded upon their being accompanied with the ordinary documents found on board of American vessels, and issued by the American government upon the representations and proofs furnished by the interested parties. If these might be false and fraudulent in the one case, so might they be in the other, and the Danish government would be equally deprived of all means of examining their authenticity in both. In the one, it would be deprived of those means by its own voluntary acquiescence in the statement of the commander of the convoying squadron; and in the other, by the presence of a superior enemy's force preventing the Danish cruisers from exercising their right of search. This was put for the sake of illustration, upon the supposition that the vessels under convoy had escaped from capture; for upon that supposition only could any *actual* injury have been sustained by Denmark as a belligerent power. Here they were captured without any hostile conflict, and the question was, whether they were liable to confiscation for having navigated under the enemy's convoy, notwithstanding the neutrality of the property and the lawfulness of their voyage in other respects.

The argument
of the
American
commissioner,
continued.

§ 536. Even supposing, then, that it was the intention of the American shipmasters, in sailing with the British convoy, to escape from Danish as well as French cruisers, that intention had failed of its effect; and it might be asked, what belligerent right of Denmark had been practically injured by such an abortive attempt? If any, it must be the right of visitation and search. But that right is not a substantive and independent right, with which belligerents are invested by the law of nations for the purpose of wantonly vexing and interrupting the commerce of neutrals. It is a right growing out of a greater right of capturing enemy's property, or contraband of war, and to be used, as means to an end, to enforce the exercise of that right. Here the actual exercise of the right was never in fact opposed, and no injury had

accrued to the belligerent power. But it would, [708] perhaps, be said, that it might have been opposed and actually defeated, had it not been for the accidental circumstance of the separation of these vessels from the convoying force, and that the entire commerce of the world with the Baltic Sea might thus have been effectually protected from Danish capture. And it might be asked in reply, what injury would have resulted to the belligerent rights of Denmark from that circumstance? If the property were neutral, and the voyage lawful, what injury would result from the vessels escaping from examination? On the other hand, if the property were enemy's property, its escape must be attributed to the superior force of the enemy, which, though a *loss*, could not be an *injury* of which Denmark would have a lawful right to complain. Unless it could be shown that a neutral vessel navigating the seas is bound to *volunteer to be searched* by the belligerent cruisers, and that she had no right to avoid search by any means whatever, it was apparent that she might avoid it by any means not unlawful. Violent resistance to search, rescue after seizure, fraudulent spoliation or concealment of papers, are all avowedly unlawful means, which, unless extenuated by circumstances, may justly be visited with the penalty of confiscation. Those who alleged that sailing under belligerent convoy was also attended with the same consequences, must show it, by appealing to the oracles of public law, to the text of treaties, to some decision of an international tribunal, or to the general practice and understanding of nations. (a)

§ 537. The negotiation finally resulted in the signature of a treaty, in 1830, between the United States and Denmark, by which the latter power stipulated to indemnify the American claimants generally for the seizure of their property by the payment of a fixed sum *en bloc*, leaving it to the American government to apportion it by commissioners appointed by itself, and authorized to determine ‘‘⁽ⁱ⁾ according to the principles of justice, equity, and the law of nations,’ with a declaration that the convention, having no other object than to terminate all the claims, ‘can never hereafter be invoked, by one party or the other, as a precedent or rule for the future.’ (a)²⁴⁵

Treaty of
1830 between
United States
and Denmark,
on the subject.

(a) Mr. Wheaton to Count Schimmellmann, 1828.

(a) Martens, *Nouveau Recueil*, tom. viii. 350. Elliot's *American Diplomatic Code*, i. 453.

[²⁴⁵ *Neutral under Enemy's Convoy*.—If a belligerent takes a neutral under his convoy, it is, as far as that belligerent is concerned, a lawful act of war; and he burdens [709] himself with the duty, in order to secure an advantage against his enemy. This is not done for the purpose of rendering service to neutrals not liable to capture, but to screen offending neutrals from search, and, if necessary and possible, from capture. It is not easy to ascribe any other motive to a neutral, in putting himself under such protection. It is not enough for the ostensible neutral to say, or even to prove, that he is not justly liable to capture; for the law of nations requires him to afford the belligerent a certain mode of satisfying himself on that point, by visit and search; and, if he refuses, resists, or fraudulently evades the proper search, he is, for that cause, liable to capture. The only question ever raised has been, whether the fact of

[¹ Omit quotation mark before according, and insert before justice.]—G.G.W.

being found under belligerent convoy, affords a conclusive presumption of an intent to deprive the other belligerent of the right of search, or is only a fact, having its weight, but open to explanation. In England, the Lords of Appeal, in an unreported case (the *Sampson*, referred to in the *Maria* and the *Nereide*), decided that the bare fact was conclusive. There has been no judicial decision on that subject, in the United States. Judge Story, in the *Nereide*, says, in the course of his reasoning, 'My judgment is, that the act of sailing under the belligerent convoy is a violation of neutrality; and the ship and cargo, if caught *in delicto*, are justly confiscable: and, further, if resistance is necessary, as in my opinion it is not, to perfect the offence, still the resistance of the convoy is, to all purposes, the resistance of the association.'⁽¹⁾ Kent (i. 154-7), and Duer on Insurance (i. 730), and Woolsey (§ 193), are of the same opinion. Hautefeuille, in his notice of the Danish claims of 1810 (*infra*), gives the arguments, but no opinion of his own (tom.⁽⁴⁾ ii. p. 162-4). Ortolan seems to admit that the act of sailing under belligerent convoy is illegal; yet he puts an instance of a vessel doing so, in the hope of escaping in case of a dispersion of the convoyed fleet, or of an engagement, as *une ruse innocente*, while it is in fact only one of the usual objects of taking belligerent convoy (tom. ii. ch. 7, p. 245). Wildman (ii. 126) and Manning (p. 369) are of opinion that the sailing under such convoy is conclusive against the neutral.

The question was presented in the well-known controversy between the United States and Denmark, upon the captures under the Danish ordinance of 1810, conducted with marked ability and learning by Mr. Wheaton for the United States, and M. de Redtz on the part of Denmark, the history of which is given at large in the text. The argument for the United States is there reported in full. The point taken was, that the Danish prize courts erred in holding the mere fact of sailing under British convoy, conclusive; and that the defence of the American vessels ought to have been allowed, which was, that they took convoy, not to avoid search by the Danish cruisers, or to abridge Danish belligerent rights, but for the sole purpose of protecting themselves against search and capture by the cruisers of France, then an ally of Denmark, who carried out the Berlin and Milan decrees, which Denmark, as well as the United States, held to be in violation of the law of nations. The reply of M. de Redtz, not presented in much fulness in the text, was to the point that, as there was no question that the American vessels took this convoy voluntarily, and not by accident or in ignorance, and remained with it, and since the object of the convoying belligerent must have been to give them an advantage over the other belligerent which they would not otherwise have, in the way of escaping search, that fact should be conclusive. It was not, he argued, a question whether the neutral could show an excuse of accident or mistake, but was an admitted voluntary act. He says the known rule of belligerent convoys is, that the vessels seeking such convoy shall first submit to search by the convoy, to make sure that they are not subject to capture by him, and that they have no intent hostile towards him or in aid of his enemy,—in fact, to a belligerent search by the convoy. They then seek to protect themselves, by his presence, from a like belligerent search by the other party, which is an unneutral course. Further, he says the purpose of the convoyed vessels is to avoid submitting to search, to accept the benefits [710] of a defence by the convoy; and, if the contest is doubtful, to escape by flight, but, if overtaken and seized, to claim the benefit of their neutrality. M. de Redtz further shows the practice of England to obtain her naval stores from Russian ports in neutral bottoms, which she convoys past the shores of Denmark. It may well be suggested, that, in a war between England and France, when England was enforcing her Orders in Council, and France her Berlin and Milan decrees,—both in violation of international law,—and Denmark was an ally of France, even if the convoyed vessels had proved that their object was only to escape search by France, in fear of her decrees, still the courts of Denmark, the ally of France, could not admit their right to resist French search. In fact, a neutral, under such circumstances, cannot be heard, after capture, to select and limit his particular motive for availing himself of the enemy's naval power.

There seems little doubt that, in condemning these vessels, as the practice in respect to convoys then stood, and in the relations of Denmark with France, the Danish courts did not violate any established rule of international law. Manning (p. 369) and Wildman (ii. 126) and Woolsey (§ 193) are of that opinion. Hautefeuille (tom. iii. p. 162-4) and give⁽¹¹⁾ the arguments, but no opinion. Ortolan seems to doubt the soundness of the American position (tom. i.^(1v) p. 245). Halleck gives the arguments and no opinion (pp. 617-619).—D.

[¹ This is not an exact quotation.]—G.G.W.

[^{11v} For and give read gives.]—G.G.W.

[¹¹ For tom. read tit.]—G.G.W.

[^{1v} For i read ii.]—G.G.W.

CHAPTER IV

TREATY OF PEACE

§ 538. THE power of concluding peace, like that of declaring war, depends upon the municipal constitution of the State. These authorities are generally associated. In unlimited monarchies, both reside in the sovereign; and even in limited or constitutional monarchies, each may be vested in the crown. Such is the British Constitution, at least in form; but it is well known that, in its practical administration, the real power of making war actually resides in the Parliament, without whose approbation it cannot be carried on, and which body has consequently the power of compelling the crown to make peace, by withholding the supplies necessary to prosecute hostilities. The American Constitution vests the power of declaring war in the two houses of Congress, with the assent of the President.^(a)²⁴⁶ By the forms of the

Power of making peace, dependent on the municipal constitution.

(a) See § 294.

^[246] *Declaration of War.*—In the *Prize Causes*⁽¹⁾ (Black. ii. 635), the construction of this clause of the constitution was fully considered. It was held that war was a certain state or condition of things, and might be brought about by the act of one party. Whenever war was to be initiated by an act of the national will, that will [711] could be constitutionally expressed only by an Act of Congress; but, if war was instituted by a foreign power, and precipitated upon the country, 'the President is not only authorized, but bound, to resist force by force. He does not initiate the war, but is bound to accept the challenge, without waiting for any especial legislative authority. And, whether the hostile party be a foreign invader or States organized in rebellion, it is none the less a war, although the declaration of it be unilateral.' In conformity with this principle, it was held that the prize courts could take jurisdiction *jure belli* of captures made by the President's orders, and adjudicate upon them in accordance with the laws of war, although, at the time of the captures, war had not been either declared or recognized as existing, by any Act of Congress. The court considered that the state of things then existing, by the act of the rebels, amounted to a war, and that it authorized the President to meet the war of the rebels by the exercise of the war-powers of blockade and capture of enemy's property, without an antecedent Act of Congress.

The minority of the court held that, although the President could, in case of insurrection or invasion, by virtue of the Acts of Congress of 1795 and 1807, use the army, navy and militia, to repel the invasion or suppress the insurrection, yet such a state of things did not, in either case, amount to a war, in the legal sense, so as to authorize the use of the powers of war, without an Act of Congress either declaring or recognizing its existence. They seemed to consider that, until the passage of such an act, the course of the government must be a kind of coercion of individuals, by municipal law, on a large scale. They arrived, however, at the same practical result with the majority, because they regarded the Act of Congress of 13th July, 1861, before which few captures were made, as sufficient for the purpose, although it did not in direct terms profess to declare or recognize a war.

The war with Mexico, in 1846, is an instance of a war not declared by Congress. The battles of Palo Alto and Resaca de la Palma were fought on the 8th and 9th of May; and Congress, on the 13th, in the preamble to a statute, declared that a state of war existed by the act of Mexico. The exercise of war-powers, before as well as after the passage of the statute, was recognized as constitutional by all departments of the government.

In the case of the ship *Eliza* (*Bas v. Tingy*, Dallas, iv. 37), the Supreme Court held that a public war existed between France and the United States, in 1799, so as to call into action

[¹ For Causes read Cases.]—G.G.W.

Constitution, the President has [711] the exclusive power of making treaties of peace, which, when ratified with the advice and consent of the Senate, become the supreme law of the land, and have the effect of repealing the declaration of war and all other laws of Congress, and of the several States which stand in the way of their stipulations. But the Congress may at any time compel the President to make peace, by refusing the means of carrying on war. In France, the King has, by the express terms of the constitutional charter, power to declare war, to make treaties of peace, of alliance, and of commerce; but the real power of making both peace and war resides in the Chambers, [712] which have the authority of granting or refusing the means of prosecuting hostilities.²⁴⁷

Power of
making
treaties of
peace limited
in its extent.

§ 539. The power of making treaties of peace, like that of making other treaties with foreign States, is, or may be, limited in its extent by the national constitution. We have already seen that a general authority to make treaties of peace necessarily implies a power to stipulate the conditions of peace; and among these may properly be involved the cession of the public territory and other property, as well as of private property included in the eminent domain. If, then, there be no limitation, expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional authorities, on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary for the national safety or policy.^(a)

Indemnity
to individuals
for losses
by public
cessions.

§ 540. The duty of making compensation to individuals, whose private property is thus sacrificed to the general welfare, is inculcated by public jurists, as correlative to the sovereign right of alienating those things which are included in the eminent domain; but this duty must have its limits. No government can be supposed to be able, consistently with the welfare of the whole community, to assume the burden of losses produced by conquest, or the violent dismemberment of the State. Where, then, the cession of territory is the result of coercion and conquest, forming a case of imperious necessity beyond the power of the State to control, it does not impose any obligation upon the

the law as to recaptures from *enemies*. The Acts of Congress had authorized certain hostilities against France on the high seas, but not on land, or in French ports, and confined the right to commit these hostilities to vessels in peril of attack, or specially commissioned for limited reprisals.]—D.

[²⁴⁷ The establishment of the Empire, in 1852, has changed the French Constitution. The power to make treaties is now solely in the Emperor; and a treaty of commerce has the legal effect of a legislative act, in respect to duties and the importation and exportation of goods. (*Annuaire des deux Mondes*, 1852-3,⁽¹⁾ p. 952; ⁽¹¹⁾ 1853-4,⁽¹¹¹⁾ p. 891. *British Annual Reg.* 1860, p. 227. *Tripier, Code Politique*, 329, 388.)]—D.

(a) *Vide ante*, § 266.

[¹ For 1852-3 read 1851-2.]—G.G.W.
[¹¹¹ For 1853-4 read 1852-3.]—G.G.W.

[¹¹ For 952 read 951.]—G.G.W.

government to indemnify those who may suffer a loss of property by the cession.^(a)²⁴⁸

§ 541. The fundamental laws of most free governments limit the treaty-making power, in respect to the dismemberment of the State, either by an express prohibition, or by necessary implication from the nature of the constitution. Thus, even under the constitution of the old French monarchy, the States-General of the kingdom declared that Francis I. had no power to dismember the kingdom, as was attempted by the treaty of Madrid, concluded by that monarch; and that not merely upon the ground that he was a prisoner, but that the assent of the nation, represented in the States-General, was essential to the validity of the treaty. The cession of the province of Burgundy was therefore annulled, as contrary to the fundamental laws of the kingdom; and the provincial States of that duchy, according to Mézeray, declared, that 'never having been other than subjects of the crown of France, they would die in that allegiance; and if abandoned by the king, they would take up arms, and maintain by force their independence, rather than pass under a foreign dominion.' But when the ancient feudal constitution of France was gradually abolished by the disuse of the States-General, and the absolute monarchy became firmly established under Richelieu and Louis XIV., the authority of ceding portions of the public territory, as the price of peace, passed into the hands of the king, in whom all the other powers of government were concentrated. The different constitutions established in France, subsequently to the Revolution of 1789, limited this authority in the hands of the executive in various degrees. The provision in the Constitution of 1795, by which the recently conquered countries on the left bank of the Rhine were annexed to the French territory, became an insuperable obstacle to the conclusion of peace in the conferences at Lisle. By the Constitutional Charter of 1830, the king is invested with the power of making peace, without any limitation of this authority, other than that which is implied in the general distribution of the constitutional powers of the government. Still it is believed that, according to the general understanding of French public jurists, the assent of the Chambers, clothed with the forms of a legislative act, is considered essential to the ultimate validity of a treaty ceding any portion of the national territory. The extent and limits of the territory being defined by the municipal laws, the treaty-making power is not considered sufficient to repeal those laws.²⁴⁹

Dismemberment of States by treaty.

[714] § 542. In Great Britain, the treaty-making power, as a Treaty-making power in Great Britain.

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 7. Vattel, Droit des Gens, liv. i. ch. 20, § 244; liv. iv. ch. 2, § 12. Kent's Comm. i. 178.

[²⁴⁸ Halleck's Intern. Law, 849.]—D.

[²⁴⁹ This state of things is altered by the establishment of the Empire, after the Revolution of 1848. See note 247, *suprà*.]—D.

branch of the regal prerogative, has in theory no limits; but it is practically limited by the general controlling authority of Parliament; whose approbation is necessary to carry into effect a treaty, by which the existing territorial arrangements of the empire are altered.

Treaty-making power in confederacies. § 543. In confederated governments, the extent of the treaty-making power, in this respect, must depend upon the nature of the confederation. If the union consists of a system of confederated States, each retaining its own sovereignty complete and unimpaired, it is evident that the federal head, even if invested with the general power of making treaties of peace for the confederacy, cannot lawfully alienate the whole or any portion of the territory of any member of the union, without the express assent of that member. Such was the theory of the ancient Germanic Constitution; the dismemberment of its territory was contrary to the fundamental laws and maxims of the empire; and such is believed to be the actual constitution of the present Germanic Confederation. This theory of the public law of Germany has often been compelled to yield in practice to imperious necessity; such as that which forced the cession to France of the territories belonging to the States of the empire, on the left bank of the Rhine, by the treaty of Luneville, in 1800. Even in the case of a supreme federal government, or composite State, like that of the United States of America, it may, perhaps, be doubted how far the mere general treaty-making power, vested in the federal head, necessarily carries with it that of alienating the territory of any member of the union without its consent.²⁵⁰

[²⁵⁰ *Treaty-making Power under the United States Constitution.*—The disputed north-eastern boundary between Great Britain and the United States involved the territory of the State of Maine, in which Massachusetts also had an interest. The line established by the Ashburton Treaty, of 1842, differed from that claimed by Maine, and ceded parts over which Maine had exercised jurisdiction. Still, the treaty was a sovereign act of the United States with Great Britain, and operated an international settlement. Neither of the States of Maine or Massachusetts was in any way party to it, or named in it, except in the fifth article, in which the United States agrees to receive and pay over to those States certain portions of a common fund established by consent, for the care of the territory while under dispute, and to pay to those States a further sum 'on account of their assent to the line of boundary described in this treaty.' Lord Ashburton disclaimed all responsibility of Great Britain for any matters between the United States and the individual States referred to in that article. Commissioners on the part of Maine and Massachusetts gave their assent to the [715] treaty before it was concluded by the government; but that was an internal matter, and did not concern Great Britain. Neither is the fact that the United States chose to secure the consent of Massachusetts and Maine, conclusive upon the much-canvassed question of its constitutional power to have made the treaty without their assent. (United States Laws, viii. 554.⁽¹⁾ Webster's Works, vi. 272, 289. Opinions of Attorneys-General, vi. 756. Kent's Comm. i. 166, 167. Woolsey's Introd. §99. Halleck's Intern. Law, 848. The schooner *Peggy*, Cranch, i. 103. *Ware v. Tilton*,⁽¹¹⁾ Dallas, iii. 199.)

If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation; and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nation, just as much as if the breach had been an affirmative act by any other depart-

[¹ For 554 read 574.]—G.G.W.

[¹¹ For *Tilton* read *Hylton*.]—G.G.W.

[715] § 544. The effect of a treaty of peace is to put an end to the war, and to abolish the subject of it. It is an agreement to waive all discussion concerning the respective rights and claims of the parties, and to bury in oblivion the original causes of the war. It forbids the revival of the same war by resuming hostilities for the original cause which first kindled it, or for whatever may have occurred in the course of it. But the reciprocal stipulation of perpetual peace and amity between the parties does not imply that they are never again to make war against each other for any cause whatever. The peace relates to the war which it terminates; and is perpetual, in the sense that the war cannot be revived for the same cause. This will not, however, preclude the right to claim and resist, if the grievances which originally kindled the war be repeated—for that would furnish a new injury and a new cause of war, equally just with the former. If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows, that all previous complaints and injury, arising under such claim, are thrown into oblivion, by the *amnesty*, necessarily implied, if not expressed; but the claim itself is not thereby settled either one way or the other. In the absence of express renunciation or recognition, it remains open for future discussion. And even a specific arrangement of a matter in dispute, if it be special and limited, has reference only to that particular mode of asserting the claim, and does not preclude the party from any subsequent pretensions to the same thing [716] on other grounds. Hence the utility in practice of requiring a general renunciation of all pretensions to the thing in controversy, which has the effect of precluding for ever the assertion of the claim in any mode.^(a)²⁵¹

Effects
of a treaty
of peace.

The treaty of peace does not extinguish claims founded upon debts contracted or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect. Nor does it affect private rights acquired antecedently to the war, or private injuries unconnected with the causes which produced the war. Hence debts previously contracted between the respective

ment of the government. Each nation is responsible for the right working of the internal system, by which it distributes its sovereign functions; and, as foreign nations dealing with it cannot be permitted to interfere with or control these; so they are not to be affected or concluded by them, to their own injury. See *ante*, § 266, and note 139. Kent, i. 165-6. Heffter, § 84. Vattel, *Droit des Gens*, liv. iv. ch. 2, § 14. Halleck, 854.]—D.

(a) Vattel, *Droit des Gens*, liv. iv. ch. 2, §§ 19-21.

[²⁵¹ Kent's Comm. i. 168-9. Halleck's Intern. Law, 852. Riquelme, *Derecho Pub. Intern. lib. i. ch. 2, tit. 13*. As an instance, the chief cause of the war with Great Britain in 1812 was the impressment of seamen from United States merchant-vessels. The treaty of peace was silent on the subject. It may well be assumed that the understanding and practice of nations would not warrant the United States in making a new war for impressments made before the war of 1812; but the silence of the treaty leaves the United States at liberty to make any subsequent act of impressment a cause of war. The abstract right of defence against such acts, and claim of immunity for them, are not affected.]—D.

subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace, unless actually confiscated, in the mean time, in the rigorous exercise of the strict rights of war, contrary to the milder practice of recent times. There are even cases where debts contracted, or injuries committed, between the respective subjects of the belligerent nations during the war, may become the ground of a valid claim, as in the case of ransom-bills, and of contracts made by prisoners of war for subsistence, or in the course of trade carried on under a license. In all these cases, the remedy may be asserted subsequently to the peace.^(b)

Uti possidetis
the basis
of every
treaty of
peace, unless
the contrary
be expressed.

§ 545. The treaty of peace leaves every thing in the state in which it found it, unless there be some express stipulation to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered country or places, they remain with the conqueror, and his title cannot afterwards be called in question. During the continuance of the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, [717] until the treaty of peace, by its silent operation, or express provisions, extinguishes his title for ever.^(a)

Effect of
restoration
of territory
by a treaty
of peace.

§ 546. The restoration of the conquered territory to its original sovereign, by the treaty of peace, carries with it the restoration of all persons and things which have been temporarily under the enemy's dominion, to their original state. This general rule is applied, without exception, to real property or immovables. The title acquired in war to this species of property, until confirmed by a treaty of peace, confers a mere temporary right of possession. The proprietary right cannot be transferred by the conqueror to a third party, so as to entitle him to claim against the former owner, on the restoration of the territory to the original sovereign. If, on the other hand, the conquered territory is ceded by the treaty of peace to the conqueror, such an intermediate transfer is thereby confirmed, and the title of the purchaser becomes valid and complete. In respect to personal property or movables, a different rule is applied. The title of the enemy to things of this description is considered complete against the original owner after twenty-four hours' possession, in respect to booty on land. The same rule was formerly considered applicable to captures at sea; but the more modern usage of maritime nations requires a formal sentence of condemnation as prize of war, in order to preclude the

(b) Kent's Comm. i. 168.

(a) Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, §§ 4, 5. Vattel, Droit des Gens, liv. iii. ch. 13, §§ 197, 198. Martens, Précis du Droit des Gens, liv. iii. ⁽¹⁾ ch. 4, § 282. Klüber, Droit des Gens Moderne de l'Europe, §§ 254-259.

[¹ For iii. read viii.]—G.G.W.

right of the original owner to restitution on payment of salvage. But since the *jus postliminii* does not, strictly speaking, operate after the peace; if the treaty of peace contains no express stipulation respecting captured property, it remains in the condition in which the treaty finds it, and is thus tacitly ceded to the actual possessor. The *jus postliminii* is a right which belongs exclusively to a state of war; and therefore a transfer to a neutral, before the peace, even without a judicial sentence of condemnation, is valid, if there has been no recovery or recapture before the peace. The intervention of peace covers all defects of title, and vests a lawful possession in the neutral, in the same manner as it quiets the title of the hostile captor himself.^(a)

[718] § 547. A treaty of peace binds the contracting parties from the time of its signature.²⁵² Hostilities are to cease between them from that time, unless some other period be provided in the treaty itself. But the treaty binds the subjects of the belligerent nations only from the time it is notified to them. Any intermediate acts of hostility committed by them before it was known, cannot be punished as criminal acts, though it is the duty of the State to make restitution of the property seized subsequently to the conclusion of the treaty; and, in order to avoid disputes respecting the consequences of such acts, it is usual to provide, in the treaty itself, the periods at which hostilities are to cease in different places. Grotius intimates an opinion that individuals are not responsible, even *civilliter*, for hostilities thus continued after the conclusion of peace, so long as they are ignorant of the fact, although it is the duty of the State to make restitution, wherever the property has not been actually lost or destroyed. But the better opinion seems to be, that wherever a capture takes place at sea, after the signature of the treaty of peace, mere ignorance of the fact will not protect the captor from civil responsibility in damages; and that, if he acted in good faith, his own government must protect him and save him harmless.²⁵³ When a place or country is exempted from

From what time the treaty of peace takes effect.

(a) Vattel, liv. iii. ch. 14, §§ 209, 212, 216. The Purissima Conception, Robinson's Adm. Rep. vi. 43.⁽¹⁾ The Sophia,⁽¹¹⁾ Ib. 138.

[²⁵² It would be more exact to say, 'from the time at which the treaty is concluded.' If the political constitution of a party to the treaty requires ratification by a body in the State, the treaty is conditional until so ratified; but the ratification may relate back to the date of signature. Often the time of the exchange of the treaties, after all the forms are complied with, is the time fixed upon for it to take effect; and, in cases of doubt, as the constitutions of States vary, it is usual to agree upon a time or event or act which shall decide its date of operation. Kent's Comm. i. 170. Halleck's Intern. Law, 855. Vattel, Droit des Gens, liv. iii.⁽¹¹¹⁾ §§ 24, 25. Phillimore's Intern. Law. iii. § 517. Heffter, § 183. Wildman, i. 145. Rayneval, tom. ii. 113. Riquelme, Derecho Pub. Intern. liv. i. tit. 1, ch. 13. Bello, Derecho Intern. ch. 9, § 6, p. 2. United States v. Reynes, How. ix. 127. Davis v. Concordia, How. ix. 280. Elsebe, Rob. v. 189. Eliza Ann, Dodson, i. 244.]—D.

[²⁵³ This arises from the difference between private suits and public criminal proceedings.

[¹ For 43 read 45.]—G.G.W.
[¹¹¹ For iii read iv.]—G.G.W.

[¹¹ For Sophia read Schoone Sophie.]—G.G.W.

hostility by articles of peace, it is the duty of the State to give its subjects timely notice of the fact; and it is bound [719] in justice to indemnify its officers and subjects who act in ignorance of the fact. In such a case it is the actual wrong-doer who is made responsible to the injured party, and not the superior commanding officer of the fleet, unless he be on the spot, and actually participating in the transaction. Nor will damages be decreed by the prize court, even against the actual wrong-doer, after a lapse of a great length of time.^(a)²⁵⁴

Cessation
of hostilities,
after treaty.

§ 548. When the treaty of peace contains an express stipulation that hostilities are to cease in a given place at a certain time, and a capture is made previous to the expiration of the period limited, but with a knowledge of the peace on the part of the captor, the capture is still invalid; for since constructive knowledge of the peace, after the periods limited in the different parts of the world, renders the capture void, much more ought actual knowledge of the peace to produce that effect. It may, however, be questionable whether any thing short of an official notification from his own government would be sufficient, in such a case, to affect the captor with the legal consequences of actual knowledge. And where a capture of a British vessel was made by an American cruiser, before the period fixed for the cessation of hostilities by the treaty of Ghent, in 1814, and in ignorance of the fact,—but the prize had not been carried *infra præsidia* and condemned, and while at sea was recaptured by a British ship of war, after the period fixed for the cessation of hostilities, but without knowledge of the peace,—it was judicially determined, that the possession of the vessel by an American cruiser was a lawful possession, and that the British recaptor could not, after the peace, lawfully use force to divest this lawful possession. The restoration of peace put an end, from the time limited, to all force; and then the general principle applied, that things acquired in war remain, as to title and possession, precisely as they stood when the peace took place. The *uti possidetis* is the basis of every treaty of peace, unless the contrary be expressly stipulated. Peace gives a final and perfect title to captures without condemnation, and as

The latter are for wrongs done to the commonwealth, by breaches of the peace, or other injuries of a public nature, and are based on an actual or constructive criminal intent. But an individual is bound to make good to another a loss he may have occasioned him, although done in ignorance, by mistake, or even if with friendly intentions. If the act was not justified and authorized by law, the doer must compensate the sufferer, without regard to his intent or motive. But, in his relations to his own government or the public, the motive and intent is the chief inquiry.]—D.

(a) The Mentor, Robinson's Adm. Rep. i. 121. (1)

[²⁵⁴ See the strictures of Kent on the results of the British decisions in reference to the Mentor, and Admiral Digby's captures. Kent's Comm. i. 171. Also, Halleck's Intern. Law, 857.]—D.

[¹ For 121 read 179.]—G.G.W.

it forbids all force, it destroys all hope of recovery, as much as if the [720] captured vessel was carried *infra præsidia* and judicially condemned.^(a)²⁵⁵

§ 549. Things stipulated to be restored by the treaty, are to be restored in the condition in which they were first taken, unless there be an express provision to the contrary; but this does not refer to alterations which have been the natural effect of time, or of the operations of war. A fortress or town is to be restored as it was when taken, so far as it still remains in that condition when the peace is concluded. There is no obligation to repair, as well as restore, a dismantled fortress or a ravaged territory. The peace extinguishes all claim for damages done in war, or arising from the operations of war. Things are to be restored in the condition in which the peace found them; and to dismantle a fortification or waste a country after the conclusion of peace, and previously to the surrender, would be an act of perfidy. If the conqueror has repaired the fortifications, and re-established the place in the state it was in before the siege, he is bound to restore it in the same condition. But if he has constructed new works, he may demolish them; and, in general, in order to avoid disputes, it is advisable to stipulate in the treaty precisely in what condition the places occupied by the enemy are to be restored.^(a)²⁵⁶

In what condition things taken are to be restored.

§ 550. The violation of any one article of the treaty is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other. A violation of any single article abrogates the whole [721] treaty, if the injured party so elects to consider it. This may, however, be prevented by an express stipulation, that if one article be broken, the others shall nevertheless continue in full force. If the treaty is violated by one of the contracting parties, either by proceedings incompatible with its general spirit, or by a specific breach of any one of its articles, it becomes not absolutely void, but voidable at the election of the injured party. If he

Breach of the treaty.

(a) Valin, *Traité des Prises*, ch. 4, §§ 4, 5. Emérigon, *Traité d'Assurance*, ch. 12, § 19. Merlin, *Répertoire de Jurisprudence*, tom. ix. tit. *Prise Maritime*, § 5. Kent's *Comm.* i. 172.

[²⁵⁵ Halleck (*Intern. Law*, 860) questions the assertion of Vattel, that contributions levied by the conqueror, while in occupation, and promised but not paid, may be collected by him, as a debt, after retrocession of the territory. He says that all the rights of a conqueror are military, and rest on force and not on contract; and that his right to require any thing ceases with the loss or surrender of his hostile occupation. Halleck's *Intern. Law*, 858. Heffter, § 178. Abreu, *Traité des Prises*, Pt. II. ch. 11. Wildman's *Intern. Law*, i. 146-159. Phillimore's *Intern. Law*, iii. §§ 520-522. De Cussy, *Droit Marit.* liv. i. tit. 3, § 373. The *John*, Report of Commissioners between the United States and Great Britain, 427. The *Sophia*, Rob. v.⁽¹⁾ 138. Valin, *Traité des Prises*, ch. 4, §§ 4, 5.]—D.

(a) Vattel, *Droit des Gens*, liv. iv. ch. 3, § 31.

[²⁵⁶ Grotius, de *Jur. Bel. ac Pac. lib. i. cap. 29*,⁽¹¹⁾ § 22. Bello, *Derecho Intern.* Pt. II. ch. 9, § 6. Halleck's *Intern. Law*, 860.]—D.

[¹ For *Sophia*, Rob. v. read *Schoone Sophie*, Rob. vi.]—G.G.W.

[¹¹ For lib. i. cap. 29 read lib. iii. cap. 20.]—G.G.W.

prefers not to come to a rupture, the treaty remains valid and obligatory. He may waive or remit the infraction committed, or he may demand a just satisfaction.^(a)²⁵⁷

Disputes
respecting
its breach,
how ad-
justed.

§ 551. Treaties of peace are to be interpreted by the same rules with other treaties. Disputes respecting their meaning or alleged infraction may be adjusted by amicable negotiation between the contracting parties, by the mediation of friendly powers, or by reference to the arbitration of some one power selected by the parties. This latter office has recently been assumed, in several instances, by the five great powers of Europe, with the view of preventing the disturbance of the general peace, by a partial infraction of the territorial arrangements stipulated by the treaties of Vienna, in consequence of the internal revolutions which have taken place in some of the States constituted by those treaties. Such are the protocols of the conference of London, by which a suspension of hostilities between Holland and Belgium was enforced, and terms of separation between the two countries proposed, which, when accepted by both, became the basis of a permanent peace. The objections to this species of interference, and the difficulty of reconciling it with the independence of the smaller powers, are obvious; but it is clearly distinguishable from that general right of superintendence over the internal affairs of other States, asserted by the powers who were the original parties to the Holy Alliance, for the purpose of preventing changes in the municipal constitutions not proceeding from the voluntary concession of the reigning sovereign, or supposed in their consequences, immediate or remote, to threaten the social [722] order of Europe. The proceedings of the conference treated the revolution, by which the union between Holland and Belgium, established by the Congress of Vienna, had been dissolved, as an irrevocable event; and confirmed the independence, neutrality, and state of territorial possession of Belgium, upon the conditions contained in the treaty of the 15th November, 1831, between the five powers and that kingdom, subject to such modifications as might ultimately be the result of direct negotiations between Holland and Belgium.^(a)²⁵⁸

(a) Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 15; lib. iii. cap. 19, § 14. Vattel, liv. iv. ch. 4, §§ 47, 48, 54.

^[257] In 1798, Congress declared that the treaties with France were no longer obligatory on the United States, as they had been repeatedly violated by the French Government, and all just reparation refused. See also Kent's Comm. i. 175-6. Heffter, § 184. Halleck, 863. Burlamaqui, Droit de la Nat. tom. v. Pt. IV. ch. 14. Bello, Derecho Intern. Pt. II. ch. 9, § 6.]—D.

(a) Wheaton's Hist. Law of Nations, 538-555.

^[258] *Treaties of Peace*.—The subject of the effect of a war upon existing treaties, how far it abrogates them, what parts of a treaty are intended to be applied to a state of war and are binding during war, and what rights and obligations are suspended as to remedies during war and revived by peace, and when a treaty of peace is held to revive treaty stipulations existing before the war, will be found fully considered *ante*, note 143, on Effect of War on Treaties,

and in the text, §§ 268, 276. See also Kent's Comm. i. 177. Halleck, 862. Phillimore, iii. § 531. Riquelme, Der. Pub. Intern. lib. i. tit. 1, cap. 13.

It is a general and necessary principle that duress cannot be set up against the obligation of a treaty of peace. Coercion and duress are of the essence and idea of war; and it is the understanding upon which nations go to war, that each appeals to the chances of successful coercion. One of these chances is, that the conqueror may turn his success into a completed conquest, and destroy the independent national existence of his enemy. If he abstains from this, recognizes his enemy as still an independent though coerced body politic, and accepts from him terms of peace, those terms are binding on each. If duress could abrogate a treaty of peace, wars would never end, except either by mere *de facto* cessation of hostilities, settling nothing, or by completed conquests. Still, it has been said that, if the conqueror exacts terms which are offensive to humanity, permanently ignominious, or unsupportable, the other party is at liberty to violate the treaty whenever he may be strong enough. But this general statement requires the moralist to maintain that a nation which has appealed from law to force, taken its chances and lost, may make an agreement with the intention of violating it, and abide its time for a new appeal to force when the other party to the agreement may be at a disadvantage. It raises the ancient question of casuistry respecting deception practised on a superior power, and extends it to the case of the losing party in a voluntary contest. This is much more a moral than a legal question, and is composed of many elements. If the conquered party was the aggressor in the war, from motives of ambition merely, the world would give him little sympathy in an attempt to save himself from completed conquest by a deceptive compact, however severely he may have been treated. But, if the war was begun unjustly by the conqueror, and especially if for the purpose of subjugation, the moral aspect of the question would be altered. So much, too, depends on the infinite degrees and kinds of exaction which are made, whether they are immoral and offensive to humanity, or merely severe and mortifying to pride, that it is impracticable to lay down a rule on the subject. An admitted violation of a treaty of peace not obtained by fraud, for the sole purpose of trying to escape from its terms by an appeal to a second war, may perhaps be justified by imaginable circumstances in the origin or conduct of the original war, or by supposable terms in the treaty itself; but it is hardly worth [723] while to attempt to give to such a case scientific limits and definitions in a treatise on what may be called, in any sense, *law*. If a treaty is obtained by fraud, it is not binding. The war contemplates coercion, but does not contemplate fraud in international arrangements. Such a treaty should be repudiated as soon as the fraud is discovered. But if, by reason of his own fraud in making the treaty of peace, one party to the war has placed the other at a military disadvantage, and kept an advantage to himself, it becomes a question of casuistry again, whether and how far the defrauded nation may use delay and secrecy, or even stratagem, to regain its equal terms, before repudiating the treaty and renewing war.

On these questions, see Dr. Woolsey's Introd. § 100. Flassan, *Diplomatie Française*, i. 323. Ward's Hist. ii. 361. Halleck's Intern. Law, 861. Wildman's Intern. Law, i. 140. Burlamaqui, *Droit des Gens*, tom. v. Pt. IV. ch. 14. Vattel, liv. iv. ch. 4, § 37. Puffendorf, liv. viii. ch. 8, § 1. Heffter, *Droit Intern.* §§ 85-98, 99.]—D.

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